Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1994

COOL LIGHT COMPANY, INC.,
PETITIONER,

v.

GTE PRODUCTS CORPORATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

The following procedural facts are involved in each of the questions presented:

A federal district court judge, heedless of his clear duty to disqualify himself because of his secret bias and prejudice against the plaintiff-appellant, Cool Light Company, Inc. ("Cool Light"), issued an order which nullified a multi-million dollar jury verdict in favor of Cool Light and granted the motion of the defendant-appellee, GTE Products Corporation ("GTE"), for a new trial. The Circuit Court affirmed the denial of Cool Light's timely request for relief from the trial court's order.

The questions presented are as follows:

1. Whether the Circuit Court's failure to fashion any relief denied Cool Light due process of law and improperly deprived it of the fruits of its trial by jury, in violation of the Fifth and Seventh Amendments to the United States Constitution.

2. Whether the Circuit Court's failure to fashion any relief — and, indeed, its failure to condemn any wrongdoing on the part of the trial judge — demonstrated due regard for the risk that its decision might undermine the public's confidence in the judicial process.

3. Whether the Circuit Court's failures to fashion any relief and to condemn judicial misconduct demonstrated due regard for the requirement of this Court that the courts over which it exercises supervision must not only mete out justice; they must also satisfy the appearance of justice, and, as a critical matter, must not tolerate even the appearance of impropriety.

4. Whether the Circuit Court's failure to fashion any relief gave adequate consideration to the risk that serious and substantial procedural irregularities in the trial court have resulted in injustice to Cool Light.

5. Whether the Circuit Court's failure to address a number of the findings and rulings of the trial court (Keeton,

J.) in its June 7, 1993 Memorandum and Order, and its ultimate denial of relief to Cool Light, is likely to produce injustice in other cases.

6. Whether the Chief Judge of the Circuit Court was in error when he concluded that the disciplinary scheme provided by 28 U.S.C. § 372(c) did not empower him to require a retired trial court judge to disclose the source, and circumstances surrounding his receipt, of prejudicial information, unrelated to the lawsuit in question, concerning Cool Light's principal, George Panagiotou.

7. Whether the Chief Judge of the Circuit Court, and the Judicial Conference of that Circuit, complied with the provisions of 28 U.S.C. § 372(c) in their consideration and disposition of the complaints which they received concerning judicial misconduct in the case.

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Petitioner, Cool Light,[1] respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The opinion of the First Circuit below is reported at 24 F.3d 349 (1st Cir. 1994) and is set forth in the Appendix at A-1. An earlier opinion of that Court in this case is reported at *Cool Light Co., Inc.* v. *GTE Products Corporation*, 973 F.2d 31 (1st Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1417, 122 L.Ed.2d 787 (1993). The order of the First Circuit below denying rehearing and rehearing *en banc* is unreported. It is set forth in the Appendix at A-58. The memorandum opinion of the District Court (Keeton, J.) denying Cool Light's motion for relief from judgment, and denying certain other related motions of Cool Light, is reported at 832 F.Supp. 449 (D. Mass.

[1] The petitioner is the wholly-owned subsidiary of a holding company, Panagiotou Industries, Inc. This disclosure is made in compliance with Rule 29.1 of the Rules of this Court.

1993). It was issued on June 7, 1993 and is set forth in the Appendix at A-21.[2] The motion seeking relief from judgment, together with the motions seeking leave to make post-trial inquiry of the remaining jurors in the case and for the appointment of a United States Magistrate Judge to sit as a special master, all of which were the subject of rulings by the District Court, are set forth in the Appendix at A-59 *et seq.*, A-116 *et seq.* and A-119 *et seq.* The complaints filed by Cool Light and/or its counsel pursuant to 28 U.S.C. § 372(c) and the rulings by the Chief Judge of the First Circuit (Breyer, C.J.) on those complaints, together with the petition for review of those rulings, are unreported and are set forth in the Appendix of A-12 *et seq.*, A-141 *et seq.*, A-143 and A-144 *et seq.* The petition for review was never acted on.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on May 25, 1994. A timely petition for rehearing and rehearing *en banc* was filed on June 7, 1994 and denied on June 16, 1994. This petition is filed within 90 days of the denial of the timely petition for rehearing and rehearing *en banc*. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person ... shall be deprived of life, liberty or property, without due process of law....

[2] The district court's final order denying Cool Light relief, its orders concerning sanctions, and a supplemental memorandum appear at the conclusion of the case as reported. 832 F.Supp. at 468.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Pertinent portions of 28 U.S.C. § 372(c), relating to judicial discipline, and 28 U.S.C. § 455(a) and (b), relating to the disqualification of judges, are set forth in the Appendix at A-157, *et seq.*

STATEMENT OF THE CASE

The United States District Court for the District of Massachusetts had original jurisdiction of the action below pursuant to 28 U.S.C. § 1332(a)(1). The diversity action was brought by Cool Light, a small company which had developed a series of innovative, heat-free lighting products for use in the motion picture and television industry.[3] The defendant, GTE, was accused, in a count for fraud, of lying about its ability to manufacture and supply quantities of reflectors — a critical component in Cool Light's products — and of a deliberate failure to supply such components under several written purchase orders which it had accepted and partially performed. As a direct result of GTE's wrongdoing, Cool Light was eventually forced out of business; GTE then introduced a competitive lighting product of its own.

On June 29, 1990, at the conclusion of a lengthy trial and after the jury has rendered a multi-million dollar verdict in favor of Cool Light in a case involving a commercial dispute

[3] Portions of the Statement of the Case are taken from Cool Light's prior petition to this Court. To avoid confusion, no record references to the Appendix which accompanied that petition and which were contained in the Statement of the Case there are included in this petition.

with GTE, the presiding trial judge (McNaught, J.) invited the members of the jury into chambers and there — over coffee and in the absence of counsel — told the jurors that he strongly disagreed with their verdict in favor of Cool Light and that he had knowledge that they did not have: that George Panagiotou, Cool Light's principal, had been involved in drug dealing.[4] Judge McNaught's remarks revealed that he had a detailed knowledge of Mr. Panagiotou's 1976 arrest and federal indictment on drug-related charges, including the exact location where the arrest occurred. He did not share with the jury the fact, which he surely must have also known, that the charges against Mr. Panagiotou had been summarily dropped by the government and dismissed by the court (Skinner, J.) in early 1977.[5]

At a hearing on August 2, 1990, Judge McNaught informed counsel for the first time that he had perceived what he believed to be an inconsistency in the jury's fact-finding and verdicts at the time they were rendered, more than a month earlier, but had decided to remain silent in the absence of any expression of concern by counsel for GTE.

On August 9, 1990, Judge McNaught ordered a new trial of only those matters tried to the jury. He made his own findings and rulings on several counts which were not submitted to the jury for determination; on all such counts, he found for GTE. There has been no retrial of any of those counts, by order of Judge McNaught.

On August 20, 1990, Cool Light moved for reconsideration of Judge McNaught's new trial order and offered to accept remittitur of the jury's award of $144,000.00, the award

[4] Appendix, at A-64 through A-74. The Circuit Court's decision, in its recitation of facts, offers a curiously bowdlerized version of the trial judge's words, dropping the word "dealing" from its account. Given the severe federal criminal penalties which the trial judge knew would attend a conviction for "drug dealing" — as opposed to the more ambiguous and possibly non-criminal "involved with drugs" — the Circuit Court's omission serves to diminish the impression of judicial bias and partiality which the trial judge's words surely communicate to any reasonable, objective observer.

[5] Appendix, at A-74 *et seq.*

which seemed to be the source of the court's concern about jury inconsistency. Judge McNaught summarily denied the motion, without explanation.

On September 17, 1990, Cool Light petitioned the First Circuit Court of Appeals for a writ of mandamus. The petition challenged the propriety of Judge McNaught's August 9 new trial order. That Court, by order dated October 22, 1990, denied the petition on grounds, *inter alia*, that Cool Light had not "raised any issues of sufficient public concern to warrant the issuance of an extraordinary writ." A certified copy of the Court's order was sent to Judge McNaught.

At no time during the procedural events described above did Judge McNaught disclose to Cool Light's counsel, or to the Circuit Court, that he had come into possession of detailed, highly prejudicial, false (indeed, *per se* defamatory) information about Mr. Panagiotou, or that he had imparted that information to the jurors, in the privacy of his chambers, as a reason for his strong disagreement with their verdict.

Faced with the extraordinary financial and logistical burden of repeating a massive jury trial of its claims,[6] Cool Light reluctantly participated in a second trial, without jury, before Judge Keeton[7] in which it relied primarily upon the transcript of evidence from its jury trial.[8] Judge Keeton ruled from the bench for GTE.

On Cool Light's first appeal, the First Circuit, which characterized the case as "unusual and perplexing", affirmed the order granting the new trial, applying an exceedingly

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[6] The first trial consumed enormous resources. Although the case was initially filed in the Central District of California, it had been removed, on *forum non conveniens* grounds, to the District of Massachusetts. At the trial, 17 out of the 23 witnesses called by both sides to testify came from California. An attempt by Cool Light to have the second trial returned to the federal court in Los Angeles, where a jury trial might have been mounted a second time, was denied.

[7] Following the retirement of Judge McNaught in February, 1991, the case was transferred to Judge Keeton's docket.

[8] The second trial was a jurisdictional prerequisite to any appellate review of the order which brought it about; such an order is interlocutory in nature and, absent mandamus, non-reviewable until after the second trial has been concluded.

deferential standard of appellate review. The appellate court, citing the trial court's broad discretion in such matters, held that a jury verdict may be totally rejected by a trial judge so long as it is not a "miscarriage of justice" for him to do so. *Cool Light*, 936 F.2d at 36. A petition for a writ of *certiorari* to this Court was denied.[9]

In the meanwhile — having been alerted for the first time to the events in Judge McNaught's chambers by a late-night telephone call from the foreman of the jury in the case to its trial counsel — Cool Light filed a motion on December 1, 1992, supported by the affidavits of four jurors,[10] seeking relief from the serious procedural and substantive irregularities which had occurred while Judge McNaught was the presiding trial judge in the case.[11] Cool Light also served subpoenas and deposition notices on those persons — including then-retired Judge McNaught, in private practice in the Boston area, and two of his former law clerks, and former counsel to GTE — believed to have information concerning the judicial misconduct alleged in the Rule 60(b)(6) motion.

By bench order entered on December 15, 1992, the District Court (Keeton, J.) stayed all of Cool Light's discovery.[12] By its order of June 7, 1993, which prompted Cool Light's appeal to the First Circuit, the District Court confirmed that it was barring all such discovery, would conduct no inquiry of its

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[9] Cool Light's recently-filed motion for relief from the orders and judgment of the district court was not mentioned in the first petition to this Court; it was, however, alluded to in a footnote contained in GTE's response to that petition.

[10] Appendix, at A-64 through A-74. Three other jurors initiated communications with Cool Light's counsel and confirmed what the jury foreman had said about the in-chambers remarks of the trial judge.

[11] Appendix, at A-59 *et seq.* Simultaneously, Cool Light filed a complaint against Judge McNaught, pursuant to 28 U.S.C. § 372(c), with the Chief Judge of the First Circuit; it later filed such a complaint, on other grounds, against Judge Keeton. Copies of each of Cool Light's administrative complaints, the responses of the Circuit Executive and Chief Judge Breyer, and Cool Light's petition for review of those responses, are contained in the Appendix at A-11, A-12 *et seq.*, A-141 *et seq.*, A-152 and A-153 *et seq.*

[12] Appendix, at A-108.

own, would not permit or conduct any interview of the jurors, would not conduct any inquiry into the possible misconduct of GTE's former counsel (while finding *prima facie* evidence of the misconduct of both Cool Light and its counsel), and would not credit the affidavit testimony of the jurors in support of Cool Light's motion.[13]

The Circuit Court's judgment of May 25, 1994, makes no reference to many of the findings and rulings contained in the District Court's June 7, 1993 Memorandum and Order upon which that court relied in reaching its result; the First Circuit affirmed that order without modification, limitation, exception or explanation with respect to those findings and rulings.

REASONS FOR GRANTING THE WRIT

This petition should be granted because there has been a wrong done — a serious and substantial wrong by a federal district court judge, amounting to a deprivation of due process, in violation of a federal statute and the oath of his office — with neither acknowledgement nor condemnation by the courts over which this Court exercises ultimate supervisory jurisdiction.

I. The Unambiguous Directives Of This Court For Dealing With Cases Of Alleged Judicial Misconduct Were Ignored By The Circuit Court.

The Circuit Court's decision in this case — and the decision of the District Court which it affirmed — represent substantial departures from any accepted and usual course of judicial proceedings, and those departures conflict squarely with an applicable decision of this Court.

In *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 845, 864-65, 108 S.Ct. 2194, 2205, 100 L.Ed.2d 855 (1988),

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[13] Appendix, at A-21 *et seq.* Judge Keeton did, however, credit a triple hearsay affidavit of GTE's counsel (reporting on a telephone conversation with an anonymous person who claimed to be one of the jurors in the case).

this Court's holding gave the District and Circuit Courts straightforward, unambiguous guidance for their handling of this case:

> We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) (citation omitted).
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> * * *
>
> The problem . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.[14] The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S.Rep. No. 93-419, at 5; H.R.Rep. No. 93-1453, at 5. Thus it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question Judge Collins' impartiality.

The Circuit Court, for all that appears from its opinion in this case, opted to decline the guidance offered by *Liljeberg;*

[14] In a footnote, this Court noted that, as it had held in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825, 106 S.Ct. 1580, 1587, 89 L.Ed.2d 823 (1986), this concern has constitutional [i.e., due process] dimensions. "We conclude that Justice Embry's participation in this case violated appellant's due process rights. . . . The Due Process Clause 'may sometimes bar trial judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties.'"

its decision fails to cite the case, let alone to distinguish it, notwithstanding Cool Light's substantial reliance on the case in its appellate briefing.[15] The oversight is inexplicable and problematical. In this case, Cool Light complains not of an *appearance* of bias, prejudice and partiality on the part of its trial judge — grounds for disqualification under 28 U.S.C. § 455(a), discussed in *Liljeberg* — but of *actual* bias, prejudice and partiality, secretly held and acted upon — grounds for disqualification under § 455(b)(1).

The Circuit court failed to deal with any of the concerns — risk of injustice to the parties, risk of injustice in other cases, and the undermining of public confidence in the judicial process — cited by this Court in *Liljeberg*.

A. *Injustice To Cool Light.*

It was Cool Light's position before the Circuit Court — and it is Cool Light's position here — that it was constitutionally entitled to have the jury verdict in its favor considered, on GTE's motion for the entry of judgment n.o.v. or, in the alternative, for a new trial, with due deference to the jury's fact-finding, and with every effort being expended to reconcile perceived inconsistencies in the jury's work. And it was entitled to have that consideration given by a qualified and impartial judicial officer, unburdened by any bias or prejudice against any party in the case. Cool Light was not, and has not been, given the benefit of any such consideration.

The linchpin of the Circuit Court's decision to affirm the District Court's denial of all relief to Cool Light, notwithstanding any judicial misconduct which may have occurred, is that the judge who presided over the second trial of Cool Light's case in fact gave the jury's verdict the constitutionally-mandated, deferential consideration required. Chief Judge Breyer, writing for the Circuit Court, observed: "... despite

[15] Judge Keeton, in his June 7, 1993 Memorandum and Order, cited *Liljeberg* but otherwise demonstrated no recognition of the need to be concerned for the public's confidence in the judicial process.

Cool Light's strong contrary protestations, our review of the record indicates that Judge Keeton gave Judge McNaught's 'new trial' decision that very new and independent review, with appropriate deference for the jury verdict, for which Cool Light argues."[16]

The Circuit Court's decision offers no record reference for that which it acknowledges — explicitly in its decision on Cool Light's first appeal[17] and tacitly in the decision which is the subject of this petition — is the central, critical, due process event in this case. It does not specify what, in the Memorandum and Order of Judge Keeton, "indicates" that such a procedural event occurred.

In fact, there is nothing in the record to indicate that such a review was undertaken, let alone performed. Cool Light's "strong protestations", now to this Court of last resort, continue unabated.

Judge Keeton is an extraordinarily careful and thorough jurist. He meticulously describes his own thought-processes in the memoranda he writes. The June 7, 1994 Memorandum and Order in this case is an example. Yet nowhere in that document does Judge Keeton purport to have conducted a deferential review of the jury's work, one seeking to reconcile the jury's general verdicts with its precise responses to 17 judicially-crafted interrogatories. Indeed, Judge Keeton does not even pay lip service to the need for any deference for the jury's work.[18]

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[16] Appendix, at A-9.

[17] The Court wrote: "Cool Light argues that the trial court had a duty to reconcile the apparent inconsistency between the verdict and the special interrogatory answer pertaining to Cool Light's total lost profits, and that the court abused its discretion by failing to enter judgment in its favor. We agree with Cool Light's assertion that the trial court had a duty to reconcile any inconsistency between the general verdict and the answers to the special interrogatories (footnote omitted). The record is clear, however, that Judge McNaught did attempt to reconcile the inconsistency he perceived and concluded that he could not . . ."

[18] The notion that any such review by Judge Keeton of Judge McNaught's new trial order somehow offers a cure for the latter's failings is at best suspect. In *Liljeberg*, the Fifth Circuit had already affirmed the trial court

What Judge Keeton *did* do, no doubt mindful that he was doing so in the context of an attack on the integrity of one of his former colleagues on the bench, and having already emphatically decided the case in favor of GTE, and against Cool Light, was to conclude that the jury verdict was properly set aside by Judge McNaught. What he *did* do was to substitute his own fact-finding for that of the jury, quite appropriate at the conclusion of a second trial, but entirely inappropriate when considering the soundness of a jury verdict in light of a losing party's motion attacking it.

It may be that the Circuit Court's offering of Judge Keeton's own words, describing the review he performed, is what it took to "indicate" that a deferential review had been undertaken. But the Circuit Court neglects to offer all of the judge's words, thus altering their context and their meaning:

> [W]hen I now make an independent review of the evidence offered in the two trials combined I conclude that the verdict [at the first trial] should have been set aside and, at the least, a new trial should have been granted, if indeed the court did not instead order judgment for the defendant notwithstanding the verdict. *As explained in my findings and conclusions, made after Cool Light's having presented additional evidence at its second opportunity, the combined evidence from the first and second trials failed to satisfy Cool Light's burden of proof on the causation issues.*

In other words, Judge Keeton, considering the same evidence the jury did and more, simply disagreed with the jury's conclusion that GTE, Cool Light's supplier and competitor, caused Cool Light terminal economic harm. To reach his result, Judge Keeton employed a theory of market infallibility not raised by GTE in more than seven years of litigation.[19]

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judge when the violation of his duty to recuse was discovered; that Court, with ultimate Supreme Court approval, promptly vacated its affirmance.

[19] For examples, see note 22, *infra*.

Deference to the jury's conclusions contrary to his own is not mentioned, and is manifestly not in evidence.

Cool Light, recognizing that Judge Keeton's fact-finding in the second trial would be scrutinized in the Circuit Court by application of a "clearly-erroneous" standard, focused its appellate efforts on what it saw as the procedural irregularities underlying the grant of the new trial. Had it, instead, been dealing with that fact-finding in the much different procedural context of a grant of a new trial — or, as Judge Keeton suggests, in the context of the entry of judgment notwithstanding the verdict — Cool Light certainly would have challenged his order and his non-deference to the work of the jury. And if a new trial before Judge Keeton had been the prospect, Cool Light would have insisted on its right to trial by jury. All such procedural protections have, instead, been lost.

The Circuit Court, oddly myopic, professes an inability to understand why Cool Light emphasizes the importance of Judge McNaught's non-disclosure to Cool Light and its counsel of his bias and prejudice at the time when it occurred, apparently on the last day of the trial with the jury concluding its deliberations. The Court expresses puzzlement as to how any earlier knowledge by Cool Light of Judge McNaught's violation of his statutory duties of disclosure and recusal — and of his very oath of office — could have made any significant difference to the result in this case.[20]

But with knowledge of such matters in June or July of 1990, Cool Light could and would have promptly moved for Judge McNaught's disqualification as presiding trial judge in the case; to take the Circuit Court at its word, that motion presumably would have been allowed. The remedy then for his misconduct would not have been, as the Circuit Court would now have it, a second trial; it would have been prompt disqualification. GTE's motion seeking to set aside the verdict would then have been ruled upon by a successor trial judge

[20] Opinion at 10, 11. Appendix at A-8.

impartially granting constitutionally-mandated deference to the fact-finding and conclusions of the jury.[21]

Instead, the case came to the Circuit Court, and comes to this Court, freighted with the labored findings and rulings of a successor trial judge who concluded, after what may have been a wholly-unnecessary second trial, that his views of the facts in the case differed markedly from those of the jury.[22] And it is that judge who, notwithstanding his own reservations about his ability to do so,[23] and about the propriety of his being required to do so,[24] was then asked to review not only his former colleague's performance, but also to confirm that the jury's verdict was correctly vacated for reasons unconnected to his former colleague's bias and prejudice.[25] Notwithstanding such a highly problematical procedural setting, the Circuit Court found the result achieved quite convincing, and reason enough to deny Cool Light any further relief.

The Circuit Court rejected Cool Light's suggestion that properly fashioned relief would return the case to the *status quo ante* as of June 29, 1990, the date when Judge McNaught's bias and prejudice were first revealed, in private, to the

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[21] Cool Light expressly and timely questioned the propriety of a review by Judge Keeton of the jury's work after he had already determined that, on his view of the merits of the case — which differed sharply from that of the jury — judgment was to be entered in favor of GTE on all counts. Appendix at A-104 through A-107.

[22] The jury found a contract, a meeting of the minds; notwithstanding evidence of an offer, acceptance and substantial partial performance, Judge Keeton found none. The jury, in its answer to Judge McNaught's special interrogatory no. 12, found fraud in GTE's statement that it "had the ability to produce, in volume, a quality product of dichroic coated reflectors per the specifications disclosed by Cool Light"; Judge Keeton found "mere commercial puffing".

[23] Appendix, at A-101 through A-103.

[24] Appendix, at A-44.

[25] The Circuit Court's treatment of the causal link between Judge McNaught's personal bias and prejudice and his rulings against the interests of Cool Light — depriving it of the fruits of a substantial award of damages — is begrudging: it writes of "partiality" "which *(in Cool Light's view)* led him to set aside the jury verdict. . . ." The emphasis is added; the quotation marks bracketing the word "partiality" are those of the Court.

members of the jury. But such relief is precisely that to which the Fifth and Seventh Amendments, and the precedents of this Court, entitle Cool Light: the nullification of orders and judgments authored by a trial judge continuing to preside in violation of a clear duty to disqualify himself, and then a review of the work of the jury, one scrupulously deferential to its fact-finding, seeking to reconcile any perceived inconsistencies, by an impartial, unbiased and unprejudiced officer of the court, unburdened by his own fact-finding and rulings.[26]

There has never been such a review.

B. *The Risk Of Injustice In Other Cases*

The Circuit Court decision — silent on myriad important matters raised and relied upon by the District Court as bases for the denial of any relief to Cool Light — may well lead to injustice in other cases in the courts of the Circuit, and beyond. Fragments of incomplete and dubious jurisprudence from Judge Keeton's pen await unwary future litigants like shards of broken glass, half-hidden in the sand on a beach in summer.

If the District Court's decision, affirmed by the Circuit Court, accurately states the law of the Circuit — and the Circuit Court's silence could certainly be so construed — this is a jurisdiction in which a trial court judge, with the tolerance of the Circuit Court, may "stonewall" questions concerning his or her alleged misconduct on the bench; in which disregard of the self-executing nature of the disqualification requirement of 28 U.S.C. § 455(a) and (b) is acceptable; in which jurors may not offer testimony of observed judicial miscon-

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[26] By placing its reliance on a purported *de novo* review by Judge Keeton of Judge McNaught's order granting a new trial, the Circuit Court disregards an additional precautionary note of this Court in *Liljeberg:* "A finding by another judge — faced with the difficult task of passing upon the integrity of a fellow member of the bench — that his or her colleague merely possessed *constructive* knowledge, and not *actual* knowlege, is unlikely to significantly quell the concerns of the skeptic." *Liljeberg,* 486 U.S. at 865, n. 12.

duct, even when, as here, they are the only witnesses to it (other than clerks of the court, whose testimony will not be sought by the court they serve and will not be permitted by the court to be sought through discovery); in which formal inquiry into allegations of judicial impropriety will not be conducted and will not be permitted to the parties litigant; and, indeed, in which a District Court judge may grumble that "[A]n Article III court is not a forum for adjudicating the merits of accusations against a retired judge (or, for that matter, even an active judge) of the court"[27] without fear of contradiction by the court which oversees him.[28]

That such a *laissez faire* approach to the supervision of judicial conduct could lead to future mischief of every imaginable stripe is beyond peradventure. "Judicial pragmatism", said these days to be much in vogue, could quickly become indistinguishable from "judicial expediency", and in either case, would be likely to lead — as characterized by Supreme Court commentator Jeffrey Rosen, writing in *The New Republic* (July 11, 1994) — to a legal system unburdened by principal and, ultimately, undemocratic. Or as a member of the United States House of Representatives recently observed, in a quite different context: "It is questionable whether, in a democracy, citizen respect for government can be maintained if as much attention is not given to the how of process as to the what of policy."[29]

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[27] Appendix, at A-44.

[28] The Circuit Court has gone to considerable lengths to avoid consideration of such matters. A formal complaint was made against Judge Keeton pursuant to 28 U.S.C. § 372(c) because of the appearance which Cool Light contended he had engendered of a "cover-up" of judicial misconduct. Chief Judge Breyer dismissed the complaint against Judge Keeton, Appendix at A-16, A-17, "as directly related to the merits of decisions or procedural rulings", adding that argument concerning such matters "is properly made in the pending appeal and not in the § 372(c) complaint procedure." And then Judge Breyer, writing for a unanimous court, discussed the merits of Cool Light's pending appeal without so much as alluding to the allegation of an apparent "cover-up."

[29] Representative James Leach (R-Iowa) in remarks to the House Banking Committee, July 26, 1994.

C. *The Undermining of Public Confidence.*

This Court has directed that, in a case involving a failure of a district judge to disqualify himself in violation of 28 U.S.C. §455(a) or (b), the guiding consideration for the lower court is to be that the administration of justice should reasonably *appear* to be disinterested, as well as to be so in fact.

The Circuit Court's decision in this case satisfies neither requirement. It is unlikely to promote confidence in the judiciary; it offers not even the appearance of justice being done. To the contrary, it may well appear to a member of the observant public that serious, prejudicial impropriety by a judicial officer of the court has been and continues to be the subject of a "cover-up", a "whitewash", and that the bearers of complaints about the matter are messengers to be "shot", at least metaphorically.

In coming to such a conclusion, the reasonable, objective observer would note that the Circuit Court, by its silence if not by its express approval, has given its imprimatur to the failure and refusal by Judge McNaught, in apparent violation of 28 U.S.C. § 455(a) and (b), and of his oath of office, to make full, timely disclosure of the facts and circumstances which led to his comments, in the privacy of his chambers, to the jury. Such an observer would note that the Circuit Court deemed unexceptional the orders of Judge Keeton which (a) barred Cool Light from making inquiry concerning Judge McNaught's probable bias, prejudice and lack of impartiality, (b) rejected Cool Light's request that the court conduct its own inquiry into such matters,[30] (c) rejected Cool Light's

[30] By way of contrast, the trial court judge in the *Liljeberg* case submitted to an oral deposition, and a hearing before another judge of the district court focused on his possible violation of 28 U.S.C. § 455(a). *See* the discussion of the procedural history of the case in *Cheeves* v. *Southern Clays, Inc.*, 797 F.Supp. 1570, 1581, n. 18 (M.D. Ga. 1992). Intended or not, there is more than a touch of cynicism in Chief Judge Breyer's observation that "it would be difficult to discover what, in fact, occurred, for the judge in question has died." Judge McNaught was alive and engaged in the private practice of law from his retirement in early 1991 until his death in the spring of 1994.

request for permission to conduct interviews of the other six jurors who were witness to Judge McNaught's comments and conduct, (d) rejected Cool Light's request that inquiry be conducted by the court into the conduct of all counsel in the case, and (e) rejected out of hand, in an aggressive expansion of the sweep of Rule 606 of the Federal Rules of Evidence, the affidavits of the four jurors who attested to Judge McNaught's misconduct.

The hypothetical observer would be likely, too, to note that the Circuit Court found nothing amiss in Judge Keeton's threatening Cool Light and its counsel with monetary sanctions, and the latter with professional discipline, based upon what he deemed to be *prima facie* evidence of an intentional violation by them of what he characterized as an unambiguous rule of the Circuit Court against any post-trial communications with jurors.[31]

As the Circuit Court noted, Cool Light's second appeal to that Court communicated its concerns over the very real personal bias and prejudice reflected by Judge McNaught's derogatory, wholly unwarranted and irrevelant post-trial comments to the jury in the case, and not merely the appearance of partiality which those comments surely gave.[32] An objective observer overhearing his comments would not question Judge McNaught's bias against Cool Light; he or she would be sure of it.

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[31] Judge Keeton categorically rejected the protestations of innocence of Cool Light and its counsel, branding their violation of this Court's rule against post-trial juror interviews as "clear" and their protestations to the contrary as "creative word play" which "approaches, if not crosses the line into, the frivolous." The Circuit Court, in its decision, notes that the Massachusetts Board of Bar Overseers "in light of existing case law permitting some level of investigation in response to unsolicited communications from jurors", disagreed with Judge Keeton's characterizations. The Circuit Court, which might have been expected to cast the tie-breaking vote, chose instead to leave its views of such matters unexpressed. It also chose not to address any of the possible First Amendment concerns which such a rule, if so broadly construed, and not limited to juror harassment or attempts to impeach a jury verdict, might entail.

[32] Opinion, at 2. Appendix at A-3.

Finally, the public is likely to note as well that both Judge Keeton and the Circuit Court — confronted by undisputed affidavit testimony concerning Judge McNaught's judicial misconduct and the absence of his denial — declined to make any findings or even to characterize Judge McNaught's conduct. Judge Keeton never reached any conclusion about the propriety of that conduct;[33] the Circuit Court sought to sidestep the issue by substituting a set of begrudging presumptions that Judge McNaught had a duty to recuse himself — "purely for argument's sake", "for purposes of this appeal", "we shall simply assume", "for argument's sake"[34] — for any critical consideration of, and for any conclusions concerning, the judicial conduct which prompted Cool Light's Rule 60(b)(6) motion in the first instance.

In other words, a member of the public would recognize that in this instance at least, where the focus is on judicial misconduct, the judges themselves are not prepared to judge.

II. The Chief Judge Of The Circuit Court Erroneously Limited The Scope Of His Disciplinary Powers Under 28 U.S.C. § 372(c).

In his June 7, 1993 Memorandum and Order, Judge Keeton took Cool Light and its counsel to task for employing the public forum of a Rule 60(b)(6) motion to question the propriety of the conduct of a judicial officer of the court. Appendix at A-45, A-46. It is not clear whether he was aware that Cool Light had filed a non-public complaint against Judge McNaught, one which had been summarily rejected by the Circuit Executive because it complained of the conduct of a retired member of the court.

Although Cool Light and its counsel later persisted with their complaint and attempted, in a timely manner, to invoke the mechanisms of 28 U.S.C. § 372(c), they had a singular lack

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[33] Opinion, at 7. Appendix at A-6.

[34] Opinion, at 2, 8. Appendix at A-2, A-6.

of success in doing so. Chief Judge Breyer, ultimately charged with the responsibility of dealing with the complaint, decided — with no real precedent to guide him — that the statutory scheme of discipline did not extend to a retired judge and did not empower the Chief Judge to require such a former member of the court to disclose the source, or circumstances surrounding his receipt, of prejudicial information about Cool Light's principal. In order to obtain further review of Chief Judge Breyer's handling of the complaint, Cool Light filed a timely petition for review.[35] And there the matter came to an end. The petition was never acted upon.[36]

This Court has, to date, been afforded the opportunity to offer little, if any, in the way of guidance for the application of the disciplinary procedures of 28 U.S.C. § 372(c); in most instances, the jurisdictional occasion to do so would have been lacking. Direct review of the decisions of the Chief Judge and/or of the Judicial Conference is not within the purview of the Court, and, indeed, such review may be wholly precluded by the express wording of the statute:

> § 372(c)(10) . . . all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

Notwithstanding such limitations on this Court's review of findings concerning judicial discipline, the Court's broad and unquestionable jurisdiction to deal with matters concerning the supervision of the lower courts and the conduct of the judicial officers sitting there — while the exercise of such jurisdiction in the context presented here is perhaps a matter of first impression — would seem to recommend that it review the

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[35] Appendix, at A-153.

[36] Judge McNaught died in early 1994, a number of months after Cool Light filed its petition for review. His death then mooted the company's complaint against him, and he took the source and circumstances of his bias against Mr. Panagiotou to the grave.

broader premise of a lack of a Chief Judge's power to require the full cooperation of a retired member of the court, to answer charges of bias and prejudice in a continuing case and to assist in their fair resolution.

CONCLUSION

The rules of this Court require specification, at the very outset of this petition, of the questions it presents. In compliance with that rule, all but one of the questions here presented can be found there. One belongs here, at the conclusion of this petition.

The overarching question presented by this petition is one posed by the Roman poet Juvenal more than two thousand years ago: "But who is to guard the guardians themselves?"

The "guardians" in this instance — the District and Circuit Court judges who have considered and ruled upon the merits of Cool Light's claims and contentions — are obviously content with the all-but-final result in the case, and with the quantity, if not necessarily the quality and nature, of the "process" by which that result has been achieved. They show impatience with Cool Light:

> We fully recognize the disappointment to the plaintiff in what appeared to be a vindication of plaintiff's rights in the form of a multimillion dollar verdict. Yet, to obviate confusion and to improve upon significant evidentiary gaps, Cool Light was given a second trial before a highly competent and fair-minded judge. His thorough analysis in finding plaintiff's failure of proof is totally justified by the record. We are convinced from our own review of the record that Judge McNaught's grant of a new trial was not a miscarriage of justice. We find no abuse of discretion in his ruling.[37]

[37] 973 F.2d 31, 36 (1st Cir. 1992). The Court did not provide any record reference or further specification as to what "significant evidentiary gaps"

* * *

> . . . Cool Light says that, on grounds of elementary fairness, the remedy for Judge McNaught's "partiality," which (in Cool Light's view) led him to set aside the jury verdict is either 1) simple reinstatement of the verdict or 2) an independent judicial review of the new trial decision. Elementary fairness, however, does not argue for reinstatement of the verdict. Rather, often if not ordinarily, the remedy for a serious procedural flaw is new, better and fairer procedure, not a monetary award to the losing party.[38]

Cool Light has never argued for "simple reinstatement" of the jury verdict, without further review of the jury's work; and in the jury's view, at least, Cool Light was the winner, not "the loser". Cool Light has asked for "newer, better, fairer procedure". The Circuit Court denied that request.

The District and Circuit Court's decisions in this case — the work of the "guardians" — represent too many compromises of the due process rights of Cool Light, all of them occasioned by incomprehensible and indefensible conduct on the part of a federal trial judge. Their decisions represent too much disregard for the need — seen as critical by this Court — to fashion relief in cases of judicial misconduct which will buttress, not further undermine, the confidence of the public in the judicial process. The Circuit Court's unexplained silence with respect to so many issues, relied upon by the District Court as determinative of the merits of Cool Light's

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it had in mind, and Judge McNaught, in his memorandum and order granting GTE a new trial, found none.

[38] Circuit Court opinion of May 25, 1994. Appendix, at A-8.

request for relief, cannot be left, paradoxically, as the last word.

This petition should be granted.

Respectfully submitted,

COOL LIGHT COMPANY, INC.
By its attorneys,

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United States Court of Appeals
For the First Circuit

No. 93-1896 & 93-1897

COOL LIGHT COMPANY, INC.,

PLAINTIFF, APPELLANT,

v.

GTE PRODUCTS CORPORATION,

DEFENDANT, APPELLEE.

JUDGMENT

ENTERED: MAY 25, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court

FRANCIS P. SCIGLIANO
Clerk

[CC. MCCABE AND VAN GESTEL]

United States Court of Appeals
For the First Circuit

No. 93-1896
No. 93-1897

COOL LIGHT COMPANY, INC.,
PLAINTIFF, APPELLANT,
v.
GTE PRODUCTS CORPORATION,
DEFENDANT, APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge*]

Before
BREYER, *Chief Judge*,
TORRUELLA and STAHL, *Circuit Judges*.

Edwin A. McCabe with whom *Karen Chinn Lyons*, *Joseph P. Davis, III* and *The McCabe Group* were on brief for appellant.
Allan van Gestel with whom *Marie P. Buckley*, *John B. Daukas*, and *Goodwin, Procter & Hoar* were on brief for Appellee.

May 25, 1994

BREYER, *Chief Judge*. The appellant, Cool Light Company, Inc. ("Cool Light"), asks for relief from an adverse judgment, Fed. R. Civ. P. 60(b)(6), on the ground that Judge McNaught, the judge who initially tried this case, was prejudiced — or, at least, gave the appearance of prejudice — against it. 28 U.S.C. § 455(a), (b). In deciding whether or not Rule 60(b)(6) relief is appropriate, we have examined the charges and counter-charges of impropriety that counsel have raised. We have assumed, but purely for argument's sake, that Cool

Light could demonstrate a significant degree of partiality (or appearance of partiality) on the part of Judge McNaught. And, we have asked whether any such partiality would justify the type of relief that Cool Light now seeks.

Upon examining the record, we found that Cool Light has already received what was, in essence, a new trial on the key issues and that Judge Keeton (the judge assigned to this matter upon Judge McNaught's retirement) independently reviewed Judge McNaught's decision to grant a new trial. Cool Light would have received no more had Judge McNaught decided to recuse himself. And, that being so, we conclude that Judge Keeton's decision not to grant Rule 60(b) relief was lawful.

I

Background

A

The Dispute Between the Parties

In the 1970's, Cool Light tried to develop and sell a special kind of lighting, to be used by film-makers, which would generate less heat that the lighting then customarily used. As part of this effort, Cool Light contacted the appellee, GTE Products Corporation ("GTE"), and the parties discussed the possibility of GTE's developing and supplying the necessary special light reflectors. Cool Light placed purchase orders for reflectors; it later found GTE's reflectors unsatisfactory; it refused to pay money that GTE thought it owed; and GTE stopped supplying the reflectors. Eventually, Cool Light went out of business.

B

Cool Light's Lawsuit

In 1984, Cool Light filed a lawsuit against GTE. The heart of the lawsuit consisted of a claim that GTE had failed to supply the reflectors it had promised and that, as a result,

Cool Light went out of business. In Cool Light's view, the core facts that Cool Light alleged (when supplemented by various alleged subsidiary facts) entitled it to damages under several different legal theories. Cool Light said that GTE's failure to supply proper reflectors 1) violated the express terms of its contract with GTE, 2) violated an implied term in its contract to deal in "good faith," and 3) demonstrated that various GTE pre-contract statements about the reflectors and GTE's plans to produce other lighting products were fraudulent. Cool Light also said that GTE's course of behavior amounted to 4) an unfair trade practice, Mass. Gen. L. ch. 93A, and 5) unfair competition, Cal. Bus. & Prof. Code § 17200. Cool Light tried the first three of these claims to a jury. It tried the latter two claims to Judge McNaught for decision without a jury.

Judge McNaught found against Cool Light on each of the non-jury claims. The jury, however, found in Cool Light's favor on the breach of contract and fraud claims. It asserted damages of $3.694 million for breach of the express terms of the contract; of $2.8 million for breach of the implied "good faith" dealing contract term; and of $9.45 million for fraud. Judge McNaught found that the jury's verdicts were inconsistent. He set aside and ordered a new trial.

At the second trial, Cool Light waived its right to a jury trial on its contract and fraud-related claims. Both parties asked Judge Keeton — replacing Judge McNaught, who had retired — to make findings of both fact and law, based on the record of the first trial plus the testimony of certain additional witnesses. Judge Keeton did so, and he found in GTE's favor. Cool Light then appealed, claiming that Judge McNaught should have accepted the jury's findings and not ordered a new trial. After examining the record, we found that the order for a new trial was lawful, and we affirmed the judgment for GTE that Judge Keeton had entered after the new trial. *Cool Light Co.* v. *GTE Prods. Corp.*, 973 F.2d 31 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993).

We add one further background point. Initially, this case involved a further set of claims by Cool Light that GTE had misappropriated various trade secrets and confidential business information. For purposes of expositional clarity, we shall postpone discussion of these claims until Part IIB of this opinion, where we shall explain why their initial presence in this case makes no difference to our result.

C

Cool Light's Rule 60(b) Motion

On December 1, 1992, Cool Light moved, under Rule 60(b)(6), for relief from Judge Keeton's judgment. Cool Light said in its motion that jurors from the first trial had contacted Cool Light's owner, George Panagiotou, and Cool Light's lawyer, Edwin A. McCabe, and told them that Judge McNaught had spoken to the jurors after they had reached their verdict. According to the jurors, the judge told them 1) that he strongly disagreed with their verdict, and 2) that he knew that Gearge Panagiotou previously had been "involved with drugs." Cool Light said that this last mentioned remark (about drug involvement) showed that Judge McNaught was prejudiced against it and meant that Judge McNaught should have recused himself. Cool Light added that, during the first trial, Mr. Panagiotou saw one of GTE's lawyers (once a law clerk for Judge McNaught) enter Judge McNaught's chambers unaccompanied by lawyers for Cool Light. Cool Light concluded that, as a result, it was legally entitled to reinstatement of the first-trial jury verdict, to an independent reexamination of Judge McNaught's new trial determination, and to an independent reeaximination of Judge McNaught's determination of the non-jury issues — or, in the alternative, to a new trial.

Judge Keeton denied the Rule 60(b)(6) motion. *Cool Light Co.* v. *GTE Prods. Corp.*, 832 F. Supp. 449 (D. Mass. 1993). He found that his further, and independent, review of the entire record led him to the same conclusion that Judge

McNaught had reached, that is to say, had he presided at the first trial, he would have set the jury verdict aside and ordered a new trial. *Id.* at 460. Judge Keeton also said that, had Judge McNaught recused himself as Cool Light says he should have done, Cool Light would simply have recieved a new trial. *Id.* at 461. He concluded that Cool Light, in essence, had already received that to which the law would entitle it were its claims of impropriety or partiality true. *Id.* at 460-61.

Judge Keeton did not characterize Judge McNaught's alleged remark to the jury either as inappropriate or as proper. He did, however, characterize Cool Light's accusations of misconduct by opposing counsel as "vague and wholly unsupported." He also found that there was "a prima facie basis" for believing that Cool Light, and its counsel, Mr. McCabe, had violated the rules governing "post-verdict contact with jurors." *Id.* at 467. (Subsequently , Bar Counsel wrote to Mr. McCabe stating that "[i]n light of existing. . . case law permitting some level of investigation in response to unsolicited communications from jurors," she was "Not pursuing this matter further," though she suggested "that in the future," he "err on the side of caution.")

Ultimately, Judge Keeton entered a final order denying Cool Light's Rule 60(b)(6) motion for relief from judgment. Cool Light now appeals from that order.

II

The Rule 60(b)(6) Decision

In reviewing the district court's denial of Cool Light's Rule 60(b)(6) motion, we need not explore the merits of the various claims of impropriety. Indeed, it would be difficult to discover what, in fact, occurred, for the judge in question has died. Rather, for purposes of this appeal, we shall simply assume, for argument's sake, that the judge made the statements that Cool Light attributes to him, and we shall also assume circumstances such that the statements would have called for recusal, *See Liteky* v. *United States*, 114 S. Ct. 1147, 1155-57 (1994). Despite these assumptions favorable to Cool Light, we none-

theless find that the district court's decision to deny the motion lay well within the meaning of its broad Rule 60(b) authority. *Cotto* v. *United States*, 993 F.2d 274, 277 (1st Cir. 1993); *Teamsters, Chauffers, Warehousemen & Helpers Union, Local No. 59* v. *Superline Transp. Co.*, 953 F.2d 17, 19 (1st Cir. 1992).

A

The Parties' Contract and Fraud Disputes

Our reasoning in respect to the claims arising out of the basic substantive dispute between the parties is the same as that of Judge Keeton. Had Judge McNaught recused himself, Cool Light would have had a new trial before a different judge. *Pontarelli* v. *Stone*, 978 F.2d 773, 775 (1st Cir. 1992). Cool Light, however, did have a new trial before a different judge. And the law entitles it to no more.

We recognize that Cool Light suggests the existence of special circumstances requiring a different result. But, we do not agree. First, Cool Light says that it recieived a new trial only on the counts originally tried to the jury (breach of contract; fraud). It did not receive a new trial on the counts tried to Judge McNaught (unfair trade practices; unfair competition). This argument is not convincing, however, primarily because Cool Light's different judge-tried claims, like its various jury-tried claims, amount to dressing up what are essentially the same facts in different sets of legal clothes. In particular, Judge Keeton's unappealed (second trial) findings that GTE did not cause the harm Cool Light alleged, that GTE had not breached its agreement with Cool Light, that GTE did not commit fraud, and that Cool Light failed to prove damages with sufficient specificity, would collaterally estop Cool Light from successfully arguing the contrary in any further proceeding related to the judge-tried claims. *Federated Dep't Stores, Inc* v. *Moitie*, 452 U.S. 394, 398-402 (1981); *Sidney* v. *Zah*, 718 F.2d 1453, 1457-58 (9th Cir. 1983); *Itel Capital Corp.* v. *Cups Coal Co.*, 707 F.2d 1253, 1260-61 (11th Cir.

1983); *Hurley* v. *Beech Aircraft Corp.*, 355 F.2d 517, 522 (7th Cir.), *cert. denied*, 385 U.S. 821 (1966). As far as the briefs and papers before us reveal, the overlap between the two sets of claims is such that, given the second trial findings, any further trial on related matters would simply prove "an empty exercise," which circumstance makes appropriate, and lawful, the denial of Rule 60(b) relief. *Cotto*, 993 F.2d at 280; *Superline*, 953 F.2d at 20.

Second, Cool Light suggests that we should not treat Judge Keeton's unappealed second trial findings as binding because it did not know about Judge McNaught's remark either a) when it decided what evidence to present to Judge Keeton, or b) when it filed its appeal. Cool Light has failed to show us, however, how any earlier knowledge could have made a significant difference. Judge Keeton gave Cool Light a full opportunity to present additional evidence at the second trial. Cool Light has not explained how, or why, knowledge of Judge McNaught's remark would have led it to produce significantly different evidence. Nor has it suggested any legal flaw in Judge Keeton's second trial findings. Neither is there any unusual problem in respect to timing. Cool Light, in fact, found out about Judge McNaught's remark after it received our opinion in its first appeal but while its petition for rehearing was pending and about one month before our mandate issued. The consequence of Cool Light's failure to show why earlier knowledge would have mattered, in our view, is that the law would give to Judge Keeton's findings their normal preclusive effect.

Third, Cool Light says that, on the grounds of elementary fairness, the remedy for Judge McNaught's "partiality," which (in Cool Light's view) led him to set aside the jury verdict is either 1) simple reinstatement of the verdict or 2) an independent judicial review of the new trial decision. Elementary fairness, however, does not argue for reinstatement of the verdict. Rather, often if not ordinarily, the remedy for a serious procedural flaw is new, better, and fairer procedure, not a monetary award to the losing party. *Pontarelli*, 978

F.2d at 775. Moreover, despite Cool Light's strong contrary protestations, our review of the record indicates that Judge Keeton gave Judge McNaught's "new trial" decision that very new and independent review, with appropriate deference for the jury verdict, for which Cool Light argues. Judge Keeton wrote:

> [W]hen I now make an independent review of the evidence offered in the two trials combined I conclude that the verdict [at the first trial] should have been set aside and, at the least, a new trial should have been granted, if indeed the court did not instead order judgment for the defendant notwithstanding the verdict.

Cool Light, 832 F. Supp. at 461.

For these reasons, we consider lawful Judge Keeton's denial of the Rule 60(b)(6) motion, in respect to all counts related to the underlying contract or fraud disputes between the parties.

B

The Trade Secret Claims

Cool Light, in its initial complaint, set forth several other legal claims that we have not yet discussed. Those claims essentially rested upon its assertion that GTE had misappropriated trade secrets and confidential business information. Cool Light set forth several different legal theories, that in its view, entitled it to damages based upon that alleged theft. *See, e.g.*, Plaintiff's Complaint Count IV (Taking of a Trade Secret, Mass. Gen. L. ch. 93 § 42); *id.* Count VII (Unjust Enrichment). As was true of the contract and fraud claims, Cool Light, at the frst trial, tried some of its trade secret related claims to a jury and others to the judge.

The trade secret related claims differ from the contract and fraud related claims, however, in that ***both*** judge ***and jury***

found against Cool Light on all other claims involving trade secrets. Further, Cool Light chose not to retry the jury-related claims before Judge Keeton. And, Cool Light has not provided us with any information suggesting that, despite the jury's having found against it in respect to those claims, a new trial would likely produce a different result. Finally, Judge Keeton's binding findings in the second trial, many of which touch on necessary elements of the trade secrets claims, would make it difficult, if not impossible, for Cool Light to prevail in a new trial. The upshot is that Cool Light has not provided us with any reason to believe it has a "potentially meritorious" trade secret related claim, *Superline*, 953 F.2d at 20, or that a new trial on the trade secret related counts would be other than "an empty exercise," *id.* For these reasons, the district court's denial of Rule 60(b)(6) motion in respect to those claims was legally proper.

The judgment of the district court is

Affirmed.

OFFICE OF THE CIRCUIT EXECUTIVE
JUDICIAL COUNCIL OF THE FIRST CIRCUIT
J.W. McCORMACK POST OFFICE AND COURTHOUSE
BOSTON, MASSACHUSETTS 02109

VINCENT F. FLANAGAN
CIRCUIT EXECUTIVE

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617-223-9049

RECEIVED
AUG 26 1993
THE McCABE GROUP

August 25, 1993

Edwin A. McCabe, Esquire
The McCabe Group
25 First Street
Cambridge, Massachusetts 02141

Dear Mr. McCabe:

Enclosed is a copy of Chief Judge Breyer's Order disposing of your misconduct complaint. Pursuant to rule 4(f) of the Rule of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability. I hereby notify you of your right to petition the Judicial Council for review of the enclosed disposition. Pursuant to rule 6(a) of the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, you have thirty days from the date of this letter to file your petition.

Sincerely yours,

VINCENT FLANAGAN
Circuit Executive

VF/ls
Enclosure

CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 145
EDWIN McCABE

BEFORE
BREYER, *Chief Judge.*

ORDER

Entered August 25, 1993

Complainant, an attorney, has filed a complaint of judicial misconduct under 28 U.S.C. § 372(c) against two district judges. The first district judge presided over the trial of a civil suit brought by complainant's client. The trial resulted in a verdict for complainant's client on some counts, but the first judge citing inconsistencies among the jury's general verdicts on various counts and the jury's answers to special interrogatories — vacated the jury's verdicts for complainant's client, and ordered a new trial. Following the retirement of the first judge, the second judge presided over the retrial of the action, with the jury waived. This retrial resulted in a judgment against complainant's client on all of the client's claims for recovery.

The First Judge

In the judicial misconduct complaint, complainant's primary allegation against the first judge is that, immediately after the jury rendered its verdict in the first trial, the first judge made comments to the jurors which, in complainant's view, suggested that the first judge harbored an "actual, personal bias or prejudice" against complainant's client and the

client's principal officer. The judge allegedly stated that he disagreed with the jury's verdicts in favor of complainant's client, and that he had information that the client's principal officer had been involved in drug dealing. According to complainant, the first judge's failure to recuse himself on this basis, or even to notify complainant that the judge had come into possession of such information, constituted misconduct cognizable under § 372(c). The complaint hints that the failure to recuse may have been deliberate, and that the judge's decision to set aside the jury verdict may have been influenced by bias against complainant's client.

Finally, the complaint suggests that there may have been something improper about the judge's mere possession of information concerning the drug indictment of complainant's client's principal officer. Since the judge had no involvement in those criminal proceedings, complainant asserts, "there is no apparent innocent explanation for [the judge's] possession of detailed information concerning those proceedings." Complainant does not specify what form any impropriety is alleged to have taken.

Long before the instant complaint was filed, the first judge retired from office pursuant to § 371(a). In so doing the judge forfeited any eligibility to exercise the judicial power of the United States under Article III of the Constitution. As a consequence, a complaint against the judge is no longer cognizable under § 372(c).

It is true that neither the Act, which authorizes complaints "alleging that a . . . district . . . judge . . . has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts," § 372(c)(1), nor this circuit's Local Rules Governing Complaints of Judicial Misconduct or Disability explicitly address the question whether a complaint against a retired judge could be cognizable. Local Rule 1(a), however, explains that "[t]he purpose of the complaint procedure is to improve the administration of justice in the federal courts. . . . The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions

that interfere with the proper administration of justice in the courts."

On this basis I conclude that the Act's complaint procedure applies only to sitting federal judges, whether active or on senior status, and not to a retired judge who is no longer eligible to exercise judicial duties. Investigating allegations against a former judge who is no longer part of the federal court system ordinarily could do nothing to improve the administration of justice in the federal courts. There would be little corrective purpose, therefore, in extending the Act to a retired judge. The circuit council, moreover, would lack any authority to discipline a judge who is no longer in office. As far as I am aware, this circuit and other circuits have uniformly adopted this view in determining past complaints under the Act, ruling that complaints against retired judges were not cognizable or that the retirement of a judge against whom a complaint had been filed concluded the matter. *See, e.g.*, Order dismissing complaint no. 86 (1st Cir. C.J. 4/19/88); Order dismissing complaint no. 27 (1st Cir. C.J. 11/21/86); Order dismissing complaint no. 88-09 (3rd Cir. C.J. 12/9/88). Accordingly, I dismiss the complaint against the first judge, pursuant to § 372(c)(3)(A)(i), as "not in conformity with" § 372(c)(1) of the Act.

"To be sure," as then-Chief Judge Campbell noted in his order dismissing First Circuit complaint no. 27, "if a complaint had potential merit, the Council might still wish to make inquiry even after a judge left the bench (particularly in the bankruptcy court), on the possibility that it would discover information which could be used to correct undesirable administrative practices that might still be extant in that court." I think it clear that Chief Judge Campbell was referring here to inquiry that the circuit council could appropriately make pursuant to its general authority under 28 U.S.C. § 332(d)(1) to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit," and not to a formal investigation under § 372(c). In any event, allegations such as those made in the instant

complaint — that a particular judge deliberately failed to recuse, or reached rulings on the basis of improper or illicit motives — are specifically limited to the conduct of the retired judge personally, and raise no possibility of correcting undesirable practices in the court generally. There is, as a consequence, no occasion for inquiry into these allegations.

For these reasons, I need not delve into the substance of the charges levied against the first judge. I do note that a complaint under 372(c) is not cognizable insofar as it challenges the legal correctness of a judge's failure to recuse himself from a particular case, Local Rule 1(e), and that the instant complaint appears to lack adequate supporting factual particulars for its charges that the judge deliberately failed to recuse, acted with improper motives, or obtained information about complainant's client in some improper way. Beyond that, however, I express no view concerning the merits of the complaint's allegations against the first judge.

The Second Judge

Complainant's allegations against the second judge stem from the second judge's denial of complainant's client's Fed. R. Civ. P.60(b) motion for relief from judgment in the client's case before the second judge. That motion asked that the first judge's order for a new trial be vacated on the ground that the first judge harbored a bias against complainant's client. The second judge, in denying the motion, ruled, in summary, that the client had failed to make any factual showing of actual bias or prejudice, and that in any event the client already had received the only available relief, i.e., a new trial before an unbiased judge. Accordingly, the second judge ruled that there was no need for a hearing, or for any further factual inquiry, into the grounds for the client's Rule 60(b) motion.

The complaint alleges as misconduct the second judge's refusal to conduct or permit further factual inquiry into complainant's client's allegations of bias on the part of the first judge. This refusal, according to the complaint, "give[s] the

appearance of a cover-up or 'whitewash' of the jurors' sworn allegations concerning [the first judge's] seeming bias or prejudice." Noting that complainant's client has filed an appeal, which is now pending in the court of appeals, the complaint further alleges that the first judge's refusal to conduct or permit further factual inquiry "will leave the ... Court of Appeals with an incomplete and inadequate record on which to consider the issues ..., which in turn may lead to a remand in order that factual findings be developed." Accordingly, the complaint argues, the second judge's ruling "is likely to prevent an expeditious determination of the merits of that motion."

Although the complaint specifically emphasizes "that the purpose of this complaint is not to raise issues concerning the substantive rulings" of the second judge, the complaint nevertheless does precisely that. Its allegations against the second judge are a mere repetition of the argument that the second judge erred in refusing to conduct or permit further factual inquiry into the Rule 60(b) motion. As complainant recognizes, that argument is properly made in the pending appeal before the court of appeals, not in the § 372(c) misconduct complaint procedure. The complaint contains no factual particulars whatsoever — nor, for that matter, even a bare allegation — that the second judge acted with any improper motive in making the rulings to which complainant objects.

Accordingly, I dismiss the allegations against the second judge as directly related to the merits of decisions or procedural rulings. § 372(c)(3)(A)(ii). In so doing, of course, I express no opinion whatsoever concerning the correctness of the judge's rulings.

I should underline, in particular, that I find clearly merits-related the allegation that the second judge's rulings may, if they necessitate a court of appeals remand for factual findings, prevent an expeditious determination of the merits of complainant's client's appeal. Although the Act covers "conduct prejudicial to the ... expeditious administration of the business of the courts," § 372 (c)(1), it is elementary that

that coverage does not extend to the many forms of delay that may result from alleged errors in rulings. Such delay is within the core of matters "directly related to the merits of a decision or procedural ruling," § 372(c)(3)(A)(ii), and therefore not cognizable under the Act.

The complaint is dismissed as not in conformity with § 372 (c)(1) of the Act, 28 U.S.C. § 372(c)(3)(A)(i), and as directly related to the merits of decisions or procedural rulings, 28 U.S.C. § 372(c)(3)(A)(ii).

s/ ILLEGIBLE

Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY, INC.,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

Memorandum and Order
June 7, 1993

Plaintiff Cool Light Co., Inc. ("Cool Light") has moved for relief from the Final Judgment entered in this case in favor of GTE Products Corporation ("GTE") and from various orders that preceded the judgment.

Numerous submissions have been filed in accordance with a schedule set in a conference held on December 15, 1992.* After the scheduled period for submissions ended, Cool Light filed an additional motion and letter to the court, and the

* Now before the court are the following submissions filed by Cool Light and others: (1) Motion of Cool Light for relief from orders and judgment and memorandum in support (Docket Nos. 242 and 243, filed Dec. 1, 1992); Memorandum of GTE in opposition (Docket No. 244, filed Dec. 14, 1992); Affidavit of Martha Ann Finnegan (Docket No. 245, filed Dec. 14, 1992); GTE's appendix of exhibits (Docket No. 246, filed Dec. 1992); (2) Motion of GTE to quash all deposition subpoenas and for entry of protective order (Docket No. 247, filed Dec. 14, 1992); Letter to the court from Edwin A. McCabe, re: def.'s motion to quash (Docket No. 248, filed Dec. 15, 1992); (3) Motion to quash subpoenas of Judge John J. McNaught, Elisabeth Medvedow, Mary Lou Moran, and Patricia Casey-Price (Docket No. 250, filed Dec. 15, 1992) and memorandum in support (Docket No. 252, filed Dec. 15, 1992); Letter to the court from Edwin A. McCabe updating previous letter (Docket No. 253, filed Dec. 15, 1992); (4) Motion of Ann L. Palmieri to quash deposition subpoena and for protective order, affidavit, and

opposing parties filed further memoranda in response.**

Cool Light and one of the persons against whom it has made accusations of professional misconduct have requested hearings on their motions, pursuant to Local Rule 7.1(D). Having considered all memoranda and documents filed to date, I conclude that well established legal rules preclude the relief Cool Light seeks. A hearing to determine Cool Light's motion is therefore unnecessary. Additional issues raised by motions of the parties remain to be determined, however, and a conference will be held to set a schedule for submissions and argument on these matters.

I. Factual Background of the Litigation

In the 1970's George Panagiotou began collaborating with Arthur Bodkins in Winthrop, Massachusetts, to produce a lighting system that would be cooler to work under than any

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memorandum in support (Docket Nos. 255, 256, and 257, filed Dec.15, 1992); (5) Motion of Charles Donelan to quash subpoena and memorandum in support (Docket Nos. 258 and 259, filed Dec. 15, 1992); (6) Motion of Cool Light seeking permission to interview jurors (Docket No. 261, filed Dec. 22, 1992); Memorandum of Cool Light in opposition to all motions seeking to limit or prevent discovery (Docket No. 262, filed Dec. 22, 1992); Cool Light's reply to GTE's opposition (Docket No. 262, filed Dec. 22, 1992); Supplemental memorandum of GTE (Docket No. 264, filed Dec. 22, 1992); Further supplemental memorandum of GTE (Docket No. 265, filed Jan. 7, 1993); Reply memorandum in support of motion of Charles Donelan to quash subpoena (Docket No. 266, filed Jan. 7, 1993); Reply of Cool Light in support of motion for relief from orders and judgment (Docket No. 267, filed Jan. 7, 1993).

**(7) Plaintiff's motion for appointment of a magistrate judge as Special Master (Docket No. 270, filed Jan. 28, 1993); Letter to the court from Edwin A. McCabe re: status of motion to interview jurors (Docket No. 269, filed Jan. 28, 1993); GTE's additional opposition to plaintiff's motion seeking permission to interview jurors (Docket No. 271, filed Jan. 29, 1993); Opposition of Charles Donelan to plaintiff's request to interview jurors and motion for appointment of a magistrate judge as Special Master (Docket No. 272, filed Feb. 4, 1993); Opposition of defendant GTE to plaintiff's motion for appointment of a magistrate judge as Special Master (Docket No. 272, filed Feb. 5, 1993); and Letter from Patricia M. Russotto to Judge Keeton (Docket No. 274, filed Feb. 17, 1993).

lights then available. The cooler lights were based upon a design that allows visible light from a lamp to be reflected forward while a portion of the heat-intensive infrared rays are transmitted through the back of the light. By 1976, Panagiotou had decided to take the cool lighting idea to Hollywood to benefit from the concentrated market for such lights he hoped to find there. In 1977, Panagiotou and others incorporated the Cool Light Company.

Cool Light began in a small plant where lights were assembled by hand. Each light consisted of a fixture, a lamp, and a coated reflector. The lamps Cool Light used were standard tungsten-halogen lamps readily available at all relevant times.

The Cool Light fixtures were also industry standard at first, although Panagiotou made improvements to the fixtures over the course of time. The principal claimed advantages of Cool Light fixtures were that they were more "user-friendly" and accessible than those available from other sources in the market place, and were more economical to use.

The reflectors were primarily what made the Cool Light products special. In the beginning, the company's source of supply of reflectors was the Liberty Mirror division of Libby-Owens-Ford Corporation and a man who worked there, Dwight Barkley. In 1978, a representative of defendant GTE, William Staubitz, approached Panagiotou and urged him to enter into a relationship with GTE for the purpose of obtaining the necessary reflectors for Cool Light. Meetings were arranged among Panagiotou, Staubitz, and another executive of GTE, Henry Hidler. The first meeting took place at Logan Airport in the fall of 1978. A second meeting took place later at GTE's coating facility in Massachusetts as Panagiotou explored the ability of GTE to make the necessary coated reflectors.

Eventually, Cool Light and GTE began working together to try to make reflectors for Cool Light's products. At first, GTE had a difficult time trying to produce reflectors that satisfied Panagiotou, but by September of 1980 enough progress had been made that Cool Light placed its first pur-

chase order. The long uphill climb to that stage having ended, a rapid decline in the business relationship between Cool Light and GTE began. Although two additional purchase orders were placed, Cool Light received few reflectors that were satisfactory to Panagiotou. At the same time, Cool Light fell behind in its payments to creditors, including GTE. The business relationship quickly soured. Panagiotou was unable to pay his existing trade debts without the reflectors he needed to make his product, and GTE was unwilling to provide more reflectors without payment on pre-existing debts. In the end, Cool Light sold off much of its stock to pay creditors and quickly ceased doing any active business.

II. Procedural Background

This case was originally tried before Judge McNaught and a jury in June 1990. In that trial, Cool Light presented five counts to the bench: Count III (Breach of Fiduciary Duty), Count VII (Unjust Enrichment), Count VIII (Constructive Trust), Count IX (Unfair and Deceptive Trade Practices [Mass. Gen. L. ch. 93A]), and Count X (Unfair Competition [California Business and Professional Code, Sec. 7200]). Judge McNaught ruled in favor of GTE on each of these claims. Count II was withdrawn before trial.

The court submitted to the jury sixteen special interrogatories as well as a general verdict form for each count and for the counterclaim.

> On the special interrogatory form, the jury found, *inter alia:* (1) GTE had made a false representation to Cool Light that it could produce the number and quality of reflectors required, (2) Cool Light relied upon that misrepresentation, (3) Cool Light and GTE had both an oral and written agreement, and (4) GTE's actions cost Cool Light $9.3 million in loss of potential profits. The general verdict forms, however, indicated that Cool Light was due $3.694 million on the breach of contract claim, $2.8

> million on the breach of implied covenant of good faith claim, and $9.45 million on the fraud claim. After the jury returned the verdict and special interrogatories, the court sent the jury back into the jury room to decide how much, if any, of the fraud damages were punitive. The jury returned with the answer that $2.95 million were compensatory in nature and $6.5 million represented punitive damages permitted under California law.

Cool Light Co., Inc. v. *GTE Products Corp.*, 973 F.2d 31, 32-33 (1st Cir. 1992).

The jury found against Cool Light on Count I (Misappropriation of a Trade Secret and Confidential Information) Count IV (Mass. Gen L. c. 93, Sec. 42 ["Taking of a Trade Secret"]), and Count V (Misappropriation of Information). The jury found against GTE on its counterclaim.

On August 2, 1990, Judge McNaught held a post-trial conference. He expressed concern that the jury's awards totaling $9.444 million in compensatory damages did not square with the jury's answer to special interrogatory number 14 in which it stated that plaintiff had suffered a total of $9.3 million in lost profits as a result of defendant's conduct. Plaintiff argued that the $144,000 discrepancy between the total amount of compensatory damages awarded by the jury and its calculation of total lost profits represented additional compensatory damages, other than lost profits, awarded by the jury on Count XI (the contract claim).

In addition, Judge McNaught stated at the August 2, 1990 conference that he was concerned that the jury might have awarded multiple damages for the same harm, and that he had difficulty understanding how the jury could have awarded different amounts of damages for Counts VI, XI, and XII for what he viewed to be essentially the same harm.

At the August 2, 1990 conference, Judge McNaught and counsel for the parties discussed defendant's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. The stated grounds for the motion for judgment

notwithstanding the verdict were that there was insufficient evidence to support the jury verdict and that the punitive damages award was not permitted under Massachusetts law, the law that defendant contended governed the case. The grounds for the alternative motion for new trial were: (1) that the court omitted a necessary instruction regarding damages, (2) that the verdict was against the clear weight of the evidence, (3) that the damages awarded were excessive, and (4) that plaintiff was awarded multiple damages for the same injury.

On August 9, 1990, Judge McNaught issued a Memorandum and Order in which he ordered a new trial on all counts tried to the jury, including the counts on which GTE prevailed. The Memorandum and Order does not explicitly state any one specific ground for the order of new trial, but it does disclose that Judge McNaught was troubled by numerous aspects of the jury verdict.

> I considered granting judgment non obstante veredicto on one or more of the counts of the complaint which were given to the jury for determination, and decided against it, since, if a new trial is granted, new evidence might be offered. There is also the fact that even if I act in that fashion, we are still left to speculate concerning the award of damages, the source of the amounts decided upon by the jury, and the possibilities that the jury came up with inconsistent amounts, or amounts that were divided among the counts improperly.
>
> In sum, one must speculate in order to assess the work of the jury.

Cool Light Co., Inc. v. *GTE Products Corp.*, No. 86-2668-Mc at 4-5 (D. Mass. Aug. 9, 1990) (Memorandum and Order on proposed orders of judgment and on motion for judgment n.o.v.). Judge McNaught did not include the counts tried to the bench in the order for a new trial.

Plaintiff moved for reconsideration of Judge McNaught's order. Judge McNaught denied the motion. *Cool Light Co., Inc.* v. *GTE Products Corp.*, No. 86-2668-Mc (D. Mass. Aug. 29, 1990) (Order denying motion for reconsideration, McNaught, J.). Plaintiff then filed a petition for a writ of mandamus in the Court of Appeals for the First Circuit. The First Circuit denied the petition. *In Re: Cool Light Co., Inc.*, No. 90-1889 (1st Cir. Oct. 22, 1990) (noting that an order for a new trial is interlocutory in nature and that the litigant would be free to seek review of Judge McNaught's order on direct appeal, after final judgment was entered).

After Judge McNaught's retirement, the case was reassigned to me by random draw.

Plaintiff again moved for reconsideration of Judge McNaught's order for a new trial. After reviewing the submissions and the record relating to Judge McNaught's issuance of the order for a new trial, I concluded that plaintiff had not made a sufficient showing that Judge NcNaught had abused his discretion in ordering a new trial. *Cool Light Co., Inc.* v. *GTE Products Corp.*, No. 86-2668-K at 4-5 (D. Mass. July 25, 1991) (Memorandum and Order) (citation omitted).

Thereafter, plaintiff waived new trial as to counts I, IV, and V, electing to try only counts VI, XI, XII, and GTE's counterclaim. Plaintiff also waived its right to a jury trial. The parties stipulated that certain witnesses would testify, and that the court would make findings and conclusions of law based on an overall appraisal of all parts of the record of the first trial that the parties chose to include in the record for the second trial, plus any additional evidence the parties presented. The second trial concluded on October 31, 1991.

At the new trial, after consideration of all the evidence presented (including almost the entire record of the previous trial), I reached findings and conclusions, on several independent grounds, that GTE was not liable to Cool Light. *Cool Light Co.* v. *GTE Products Corp.*, No. 86-2668-K (D. Mass. Dec. 1, 1991) (Opinion). In summary, I found that Cool Light had not sustained its burden of proof relating to breach of

contract, fraud, or breach of implied covenant of good faith and fair dealing, and found Cool Light's evidence as to loss of profits to be entirely speculative. I ordered Final Judgment against Cool Light on all counts and dismissed GTE's counterclaim.

Plaintiff elected to appeal only Judge McNaught's decision to vacate the jury verdict and grant a new trial.

The Court of Appeals for the First Circuit affirmed. *Cool Light Co., Inc.* v. *GTE Products Corp.*, 973 F.2d 31 (1st Cir. Aug. 21, 1992). The appellate court reviewed in considerable detail Judge McNaught's decision and found that, based on the inconsistency of the jury's verdicts, Judge McNaught's decision to order a new trial was appropriate. *See Id.* at 35-36. The appellate court also denied Cool Light's subsequent petition for rehearing or rehearing en banc. *Cool Light Co., Inc.* v. *GTE Products Corp.*, No. 92-1082 (1st Cir. Oct. 15, 1992).

Plaintiff now moves for relief from the Final Judgment entered after the second trial and from various orders entered by Judge McNaught, including his order for a new trial. Cool Light requests (1) reconsideration of the counts tried to the bench before Judge McNaught; (2) reconsideration of GTE's motion for judgment n.o.v., Judge NcNaught's order for a new trial, and the final judgment entered after the second trial; and (3) reinstatement of the jury verdict. (Cool Light's mem. in supp. of mot. for relief at 13.)

III. Prerequisites to Post-Judgment Relief

Cool Light seeks post-judgment relief based upon a claim of alleged improper failure of Judge NcNaught (the trial judge to whom this case was originally assigned) to recuse himself because of bias against George Panagiotou, the principal officer and agent of Cool Light.

Cool Light also seeks discovery to develop support not only for this claim but as well to support far more serious accusations Cool Light makes against Judge McNaught, as the trial judge, and against attorneys for GTE, as officers of this court,

with respect to allegedly unprofessional conduct while the jury trial was in progress.

On the record now before the court, including all submissions filed under the schedule set by the court, these accusations are not supported by evidence. Cool Light has, in effect, taken the position that in order to determine whether it can develop factual support for its accusations, it should be allowed to take depositions of Judge NcNaught, persons who were part of his staff at the time of the jury trial, jurors, and persons who served as attorneys for GTE during the jury trial. Also, Cool Light proffers the affidavit of its lead counsel as a witness in this proceeding, while he continues to serve as Cool Light's lead counsel. And Cool Light requests that an evidentiary hearing be scheduled before this court during which Cool Light might call all of these persons as witnesses.

Cool Light has not called attention to any precedent for allowing such an extraordinary request, and I am aware of none.

In these circumstances, I conclude that, before allowing any form of discovery or court proceedings addressing the merits of Cool Light's accusations of misconduct, the court must first consider whether Cool Light has made a proffer sufficient to meet the prerequisites of a prima facie showing sufficient, factually and legally, to support relief. *See In Re United States,* 666 F.2d 690, 695 (1st Cir. 1981) ("a charge of partiality must be supported by a factual basis") (citations omitted); *cf. Weinberger* v. *Great Northern Nekoosa Corp.*, 925 F.2d 518, 527-28 (1st Cir. 1991) (noting the requesting party's "duty to lay a foundation for a[n evidentiary] hearing" on a motion for attorney's fees).

Precedents directly bearing upon an extraordinary request such as Cool Light makes are limited, but precedents in analogous contexts support the conclusion I draw from *In Re United States, supra.* One analogy is to charges of misconduct against law enforcement officers. *See Franks* v. *Delaware,* 438 U.S. 154, 171 (1978) ("To mandate an evidentiary hearing [concerning the validity of affidavit supporting search warrant],

the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. . . . [A]llegations must be accompanied by an offer of proof."); *Copp* v. *United States*, 968 F.2d 1435, 1438 n.1 (1st Cir. 1992) (noting that it is not an abuse of discretion for a district court to deny a request for an evidentiary hearing to question the propriety of an IRS summons if the taxpayer has not made a sufficient threshold showing of improper purpose). *See also United States* v. *LaRouche Campaign*, 682 F.Supp. 610, 621-22 (D. Mass. 1987) (outlining a set of questions that may be considered by the trial court in evaluating requests for evidentiary hearings during pretrial proceedings in criminal cases).

Absent a prima facie showing of a factual and legal basis for relief the court would be authorized to grant if the prima facie showing were credited, factually and legally, after full hearing, allowing the court's processes to be used for further proceedings on Cool Light's motion for relief from the final judgment and from orders that preceded the judgment would be unjust both to other parties to this proceeding and to the parties to other cases on the court's docket, the consideration of which would necessarily be delayed by the commitment of court resources to further proceedings in this case. *Cf. In Re United States*, 666 F.2d at 695 (if less than factually supported bases for recusal were required, "a judge could abdicate on difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias") (citation omitted).

Cool Light asserts that, in accordance with 28 U.S.C. 455(a) and (b), Judge McNaught had a duty to recuse himself and, furthermore, that his failure to do so tainted the proceedings over which he presided. As remedy Cool Light seeks reinstatement of the jury verdict in the first trial, or in the alternative a new trial. I turn first to additional factual background and then, in Part V, to the prerequisites to any relief that this court might be authorized to grant to Cool Light.

IV. Additional Factual Background Bearing Upon the Motion for Relief

As a basis for its motion for relief, Cool Light makes first, a claim that Judge McNaught should have recused himself for bias. In support of this claim, Cool Light alleges that, on June 29, 1990, after Judge McNaught adjourned the jury trial, he spoke with the jurors in chambers. During that conversation, according to affidavits of four jurors submitted by Cool Light, Judge McNaught told the jurors that he disagreed with the jury's verdict in favor of Cool Light and mentioned that the president of Cool Light, who was also plaintiff's key witness, was involved with drugs. (W. Koerner Aff. ¶6; N. Fischer Aff. ¶4; R. Swift Aff. ¶4; J. Livesey Aff. ¶4.)

Cool Light provides the following account of how it learned of this alleged post-trial conversation between the judge and jurors. On September 9, 1993, more than two years after Judge McNaught ordered a new trial and nine months after final judgment was entered, Cool Light's president George Panagiotou telephoned jury foreperson William Koerner and asked Koerner to call Cool Light's counsel Edwin A. McCabe. Nothing in the record explains what prompted Panagiotou to call Koerner. Nor does Cool Light provide details of this conversation.

Koerner affirms that he was pleased to hear from Mr. Panagiotou, and promptly did as he requested. (W. Koerner Aff. ¶2.) Koerner states that this was the first communication of any kind between Koerner and Panagiotou. *Id.*

According to attorney McCabe, Koerner called him at his home on September 9, 1992. (E. McCabe Aff. ¶3.) McCabe states that during this conversation, Koerner expressed his concern that the jury's work for six weeks had been nullified by Judge McNaught's grant of a new trial, and disclosed the contents of letters exchanged between Koerner and Judge McNaught after the new trial was ordered. (E. McCabe Aff. ¶2.)

Koerner had written to Judge McNaught to express his concern about the order for a new trial and asked for an explanation. (*See* Letter from W. Koerner to Judge McNaught, dated Sept. 10, 1990, attached to Cool Light's Motion for Relief as exh. A.) In response, Judge McNaught had written to Koerner, explaining that it would be inappropriate for the judge to comment further on the case and enclosed a copy of his August 9, 1990 Memorandum and Order. (*See* Letter from Judge McNaught to W. Koerner, dated Sept. 11, 1990, attached to Cool Light's Motion for Relief as exh. A.) In his communication with Judge McNaught, Koerner did not express concerns about the comments that Judge McNaught had allegedly made to the jurors after the trial.

McCabe avers that he did not learn of Judge NcNaught's alleged statements to the jurors until Koerner's second telephone call on September 29, 1992 (E. McCabe Aff. ¶2). McCabe states that soon after his conversation with Koerner, he received a call from another juror, Janet Livesey, "who had apparently been prompted by Koerner."(E. McCabe Aff. ¶6.) McCabe avers that Livesey "essentially confirmed" what Koerner had told him about Judge NcNaught's post-verdict comments, and added a few more details.

McCabe states that when he received the second call from Koerner and the call from Livesey, he was home convalescing from throat surgery. (E. McCabe 2d Aff. ¶8.) According to McCabe he did not return to work full-time until October 13, 1992. (*Id.* 8.)

McCabe states that, after hearing from Koerner and Livesey, and apparently after returning to work full-time, he learned the details of Panagiotou's 1976 arrest, indictment, and the subsequent dismissal of the indictment. He states that he located and read the official court file that had been sent to a storage facility in 1981. (E. McCabe Aff. ¶9.)

According to the affidavits submitted in support of plaintiff's motion, two more jurors, allegedly prompted also by Koerner, made contact with and provided information to

McCabe. (See R. Swift Aff. and M. Fischer Aff., attached to Cool Light's motion for relief as exhs. C and B .)

From late September through late November, 1992, McCabe avers that he spent two months in two related activities — first, conducting research regarding the information McCabe had received, allegedly unsolicited by him, from the four jurors and, second, preparing their affidavits for signature. (E. McCabe 2d Aff. ¶16; *see also* W. Koerner Aff. ¶2, J. Livesey Aff. ¶2, M. Fischer Aff. ¶2, and R. Swift Aff. ¶2 (attesting that the affidavits were "prepared and executed at the request of counsel for the plaintiff, Cool Light Company, Inc.").)

At no time before filing its motion with this court on December 1, 1992, did Cool Light seek leave of the court to correspond or talk with the jurors.

V. Judicial Recusal

A. *A Judge's Duty of Recusal and a Litigant's Remedies*

Precedents interpreting the recusal statute as applied to trial judges establish that ordinarily the judge whose duty of recusal is in question must be the first to pass on whether recusal is required under §455. *See United States* v. *Chantal*, 902 F.2d 1018, 1024 (1st Cir. 1990). The usual rule does not apply here, however, in view of Judge McNaught's retirement. In these circumstances, I conclude that as the trial judge to whom this case was drawn on Judge NcNaught's retirement, I must make the initial determination of whether recusal was required.

The standard that the subsequently-assigned trial judge applies in making this first-instance determination regarding recusal may differ in one sense from that the originally-assigned trial judge would have been required to apply. The original decisionmaker would come to the matter with knowledge beyond that the later-assigned decisionmaker has. The statute may be interpreted as requiring the original deci-

sionmaker to take that knowledge into account, at least if doing so would tend to favor recusal. In contrast, the later-assigned decisionmaker must consider the matter on the basis of evidence received in the proceeding seeking relief for the failure of the original decisionmaker to recuse himself. This contrast may have limited significance, however, if any at all, because even the original decisionmaker must apply an objective standard of judgment — whether "his impartiality might reasonably be questioned" — rather than his own "subjective" view about his impartiality. For this reason, the later-assigned decisionmaker in the circumstances presented here, in making this first-instance determination about another judge's duty of recusal, must apply this objective standard — whether the original judge's "impartiality might reasonably be questioned." *See. e.g., United States* v. *Cowden*, 545 F.2d 257, 267 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977).

In some respects, the standard to be applied in considering possible grounds for recusal varies depending on which part of section 455 is involved — part (a) or part (b). I turn first to part (b).

1. *Disqualification under 28 U.S.C. §455(b)(1).*

Section 455(b)(1) calls for disqualification where a judge "has a personal bias or prejudice" concerning a party. The statute states:

> (b) He shall . . . disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Unlike subsection (a), which is discussed below, subsection (b)(l) requires a showing of bias in fact. *Chantal*, 902 F.2d at 1023. Under §455(b)(1), the "circumstances calling for disqualification must be personal in the sense that the source of

bias/prejudice must arise out of extrajudicial, not judicial, proceedings." *Id.* If the prima facie showing is made, the judge must engage in factfinding and determine whether the facts would convince a reasonable person that bias exists. *Chantal,* 902 F.2d at 1022 (citation omitted).

Cool Light claims that Judge McNaught's alleged statements to the jury after the first trial created an appearance of bias, and are evidence, as well, of bias in fact. Part of the argument is, apparently, that the court should infer that Judge McNaught's findings and legal rulings against Cool Light are evidence of this bias. Precedents, however, do not favor such an inference. *See Town of Norfolk* v. *United States Army Corps of Engineers,* 968 F.2d 1438, 1460-62 (1st Cir. 1992) (reviewing a judge's rulings and accompanying statements in the context of the entire litigation, and holding that the judge had not abused his discretion in denying the motion for recusal). "When a party loses calamitously, it may seem an easy excuse to blame the judge and impugn his fairness — but [the Court of Appeals for the First Circuit] is not prone to swallow sour grapes whole, without concrete evidence of spoliation." *Fashion House, Inc.* v. *K Mart Corp.,* 892 F.2d 1076 (1st Cir. 1989). I find that plaintiff has failed to make a proffer sufficient to constitute a prima facie showing that Judge McNaught was biased in fact.

Cool Light points to nothing in the course of the trial or pretrial proceedings that shows bias or prejudice in fact. The affidavit of one juror from the first trial includes assertions that she had "a general impression that Judge McNaught . . . was biased in favor of GTE" (M. Fischer Aff. ¶5, attached to plaintiff's mot. seeking relief from judgment). Even if admissible as evidence in this proceeding (an assumption contrary to my conclusion in Part VI below), these assertions by a juror of her conclusion are not an adequate factual basis for Cool Light's charge. *See Cotto* v. *United States,* No. 92-2440 (1st Cir. May 19, 1993), slip op. at 5-6 (noting that the court need not consider "unsubstantiated conclusions" in Rule 60(b)(6) motion). Likewise, McCabe's unattributed alle-

gation that an unnamed source overheard a conversation between Judge McNaught and unidentified court personnel, at some point during the trial, cannot serve as a basis for further proceedings with regard to an alleged violation of §455(b). McCabe's failure to provide more specific information — regarding, for example, when this alleged conversation occurred, the identity of his source, or the circumstances that brought the alleged conversation to his attention — is a striking lack of disclosure when considered alongside the serious allegations he makes.

In summary, plaintiff having failed to make a prima facie showing of elements required under §455(b)(1), there is no basis in the record before me for concluding that Judge McNaught had a duty to recuse himself for bias in fact, or for concluding that Cool Light has made a sufficient proffer to justify an evidentiary hearing on this subject.

2. *Disqualification under 28 U.S.C. §455(a).*

"The test for disqualification under section 455(a) is straightforward: 'whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant . . ., but rather in the mind of the reasonable [person].'" *Camacho* v. *Autoridad deTelefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989) (quoting *Cowden*, 545 F.2d at 265).

28 U.S.C. §455(a) states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"[S]ection 455(a) is automatic, mandatory and self-executing." *Chantal*, 902 F.2d at 1023. "[I]n the First Circuit, §455(a) is an independent basis for mandatory disqualification which requires no determination of bias in fact." *Id.* Nor

under §455(a) does the source of the judges's statement matter. *Id.* at 1023-24. In making a determination in compliance with §455(a), a judge must be aware, however, that the standard is *not* one of mere suspicion. *See In Re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989), *cert. denied, ACW Airwall Inc.* v. *United States Dist. Court of Dist. of Puerto Rico*, 495 U.5. 957 (1990) (Allied I) (more than suspicion is required "because the disqualification decision must reflect a weighing of the need to secure public confidence through proceedings that appear impartial" against the need to prevent a party "from too easily obtaining the disqualification of a judge, thereby manipulating the system for strategic reasons, perhaps to obtain a judge more to his liking").

I assume for present purposes that if admissible evidence were before the court to support findings consistent with all of plaintiff's allegations, a factual question would be presented as to whether a reasonable person might question the trial judge's impartiality. *See, e.g., Berger* v. *United States*, 255 U.5. 22 (1921) (judge allegedly made anti-German remarks in a case involving German and German-American defendants); *Chantal*, 902 F.2d 1018 (1st Cir. 1990) (judge made strong statements when previously sentencing defendant in connection with previous similar crime); *Roberts* v. *Bailar*, 625 F.2d 125 (6th Cir. 1980) (recusal required where, in pretrial hearing on discrimination suit, judge remarked that he knew defendant to be an honorable man who would never intentionally discriminate against anyone). On the basis of this assumption, look now to whether any of the relief sought by Cool Light in this proceeding could be granted if, after an evidentiary hearing, the court made findings that these factual allegations were supported by credible evidence.

B. *The Timeliness of Claim for Relief*

In general, a party who acquires information supportive of a claim for mistrial or new trial is precluded from such relief if, rather than presenting the matter promptly to the court,

the party awaits the outcome of the trial and then, after losing, for the first time moves for relief. *Cf.* Fed. R. Civ. P. 60(b) and 59(b) (timeliness provisions). In this case, were there not other grounds precluding the relief Cool Light seeks, it would be necessary to consider more closely the excuses proffered for Cool Light's filing this motion only after it had exhausted all avenues for claiming that final judgment should be entered on the jury verdict in the trial before Judge McNaught. *See Cotto*, No. 92-2440 (1st Cir. May 9, 1993), slip op. at 11 (quoting *Pioneer Inv. Servs. Co.* v. *Brunswick Assoc. Ltd. Partnership*, 113 S.Ct. 1489, 1497 (U.S. 1993) ("to justify relief under subsection (6), a party must show extraordinary circumstances suggesting that the party is faultless in the delay")). I need not, and do not, examine the issue further in this case in view of my conclusion that the relief sought must be denied on other grounds explained in Parts V.C and VI below.

C. *The Propriety of Retrospective Relief When Cool Light Already has Received Independent and Impartial Review of its Substantive Claims and of Judge McNaught's Order for a New Trial*

"[W]here no actual bias is at issue, where the question is solely one of appearances, judicial actions already taken are not necessarily rendered invalid because of a circumstance that violates §455(a)." *In Re Allied-Signal Inc.*, 891 F.2d 974 (1st Cir. 1989) *(Allied II)*. In fashioning retrospective relief, a court should do so with an eye toward accomplishing a just result. *Id.* at 976 (citing *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988)). Specifically,

> in determining whether justice requires that a judgment be vacated for a violation of §455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk the denial of relief will produce

> injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Liljeberg, 486 U.S. at 864.

Ordinarily the appropriate remedy for breach of a trial judge's duty of recusal is a new trial before a different judge. *Pontarelli* v. *Stone*, 978 F.2d 773, 775 (1st Cir. 1992) ("If a trial judge has wrongly failed to disqualify him or herself, the remedy to correct this situation is for the appellate court to reverse the decision of the case on the merits and to order a new trial before a different judge."); *cf. Fashion House*, 892 F.2d at 1096 (noting in *dicta* that under the applicable local rules of the District of Rhode Island, the appellate court's remand of the case for retrial on other grounds would result in reassignment to a new trial judge, thereby rendering moot the attack on the trial judge's fairness and demeanor). *See also*, *Camacho*, 868 F.2d at 490 (the appellate court having "independently confirmed the correctness of the lower court's decision," the trial "judge's refusal to recuse himself was, at worst, harmless error" thereby rendering moot the matter of disqualification) (citation omitted).

Both this court and the First Circuit upheld Judge McNaught's order for a new trial, having determined, among other grounds, that the inconsistency in the general verdicts and awards of damages by the jury warranted new trial. *See Cool Light Co.* v. *GTE Products Corp.*, 973 F.2d 31 (1st Cir. 1992).

Although these reviews were made on an abuse of discretion standard, both this court and the appellate court thoroughly examined Judge McNaught's decision to order a new trial. This court cited "numerous concerns" about the jury's inconsistent verdict and damages awards and concluded that Judge McNaught's decision to grant a new trial should stand. *Cool Light Co.* v. *GTE Products Corp.*, No. 86-2668-K, Memorandum and Order at 4-5 (D. Mass. July 25, 1991). The First Circuit upheld Judge McNaught's decision, concluding that the order was appropriate "where speculation and confuusion

are manifest in not only the verdict but the evidentiary record itself." *Cool Light Co.*, 973 F.2d at 36.

In the present proceeding I take account of the possible argument that a nondeferential review of Judge McNaught's order is required. I have therefore reconsidered under a *de novo* standard the submissions that were before me in support of Cool Light's motion for reconsideration of Judge McNaught's allowance of the motion for new trial and Cool Light's request that this court set aside Judge McNaught's order and enter a judgment based upon some or all of the jury's findings. In so doing, I have not gone back to identify and consider those parts of the record of the first trial that no party presented to me in any of the proceedings before me. Neither, however, has Cool Light called attention to anything in the record of the first trial that was not called to my attention in the record and yet could be material to my *de novo* review. I conclude that, when addressing the matter *"de novo"* (that is, independently and nondeferentially), I reach the conclusion that a new trial should have been granted. The primary grounds for this conclusion are the ambiguities and arguable inconsistency of findings of the jury and the insufficiency of the evidence to support the damages findings on any basis short of speculation. Judge McNaught's order for a new trial gave Cool Light the benefit of doubt about sufficiency of the evidence; it allowed new trial not only on the counts the jury resolved in Cool Light's favor but as well on other counts they resolved in favor of GTE, explicitly noting as well that new evidence might be offered by Cool Light at the new trial. *Cool Light Co., Inc.* v. *Products Corp.*, No. 86-2668-Mc at 4-5 (D. Mass. Aug. 9, 1990) (Memorandum and Order on proposed orders of judgment and on motion for judgment n.o.v.).

Another independent basis for concluding at this time that either a judgment on the original verdict or another new trial in this case would be entirely inappropriate is that, even after Cool Light had a chance to offer additional evidence beyond that offered at the first trial, when I now make an indepen-

dent review of the evidence offered in the two trials combined I conclude that the verdict should have been set aside and, at the least, a new trial should have been granted, if indeed the court did not instead order judgment for the defendant notwithstanding the verdict. During the second trial Cool Light had full notice of the court's concern about the sufficiency of the evidence on the critical causation issues in the case. As explained in my findings and conclusions, made after Cool Light's having presented additional evidence at its second opportunity, the combined evidence from the first and second trials failed to satisfy Cool Light's burden of proof on the causation issues. No showing is proffered that Cool Light could do any better if offered a third trial.

In summary, if a court, considering the matter *de novo* in light of the full record in this case, did not order judgment for defendant on all counts tried to the jury, notwithstanding the verdict of the jury on some counts, it should at least set that verdict aside because the verdict was contrary to the overwhelming weight of the evidence on causation issues central to every claim asserted by the plaintiff and found for the plaintiff by the jury. Thus, it was entirely appropriate that a new trial be granted.

Moreover, in the proceedings occurring after Judge McNaught's retirement, Cool Light received a *de novo* retrial of its substantive claims against GTE. Cool Light has not argued that it was foreclosed, in either trial, from fully presenting its case. Cool Light does not claim that it was impeded in conducting discovery, introducing evidence, engaging in cross-examination, or making legal arguments orally or in writing in the second trial. Thus, even if it be assumed that Judge McNaught erred in failing to recuse himself, the classic remedy has already been provided — a second trial before another judge.

Cool Light appealed from the final judgment entered after the second trial. In that appeal, however, it elected not to challenge any ruling made in the second trial. Instead it challenged only the order granting new trial and the failure

to enter judgment on the verdict received in the first trial.

Rule 60(b) does not provide an escape from the consequences of a party's limiting the scope of its appeal. Cool Light's present motion — by its nature a Rule 60(b) motion, whether or not it is so labeled — cannot revive rights to challenge rulings made in the second trial that it chose not to challenge in its appeal from the final judgment in this case. *See Ojeda-Toro* v. *Rivera-Mendez*, 853 F.2d 25, 30 (1st Cir. 1988) (a party may not invoke Rule 60(b) to evade consequences of decision not to appeal where decision was a "free, calculated, deliberate choice[]") (quoting *Ackermann* v. *United States*, 340 U.S. 193, 198 (1950)).

Cool Light has failed to show a likelihood that a third trial in this case, if granted, would result in a different outcome. "[I]t is the invariable rule, and thus, the rule in this Circuit, that a litigant, as a precondition for relief under Rule 60(b), must give the trial court a reason to believe that vacating the judgment will not be an empty exercise." *Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 59* v. *Superline Trans. Co.*, 953 F.2d 17, 20 (1st Cir. 1992) (collecting cases); *accord Cotto*, No. 92-2440 (1st Cir. May 19, 1993) slip op. at 13. *See also* Fed. R. Civ. P. 61.

The same conclusion is supported by viewing the matter from the perspective of "law of the case." Since the findings and conclusions in the second trial were not appealed, and the judgment following the second trial has been affirmed by the Court of Appeals for the First Circuit, the legal conclusions of the second trial are the law of the case. *See Lacy* v. *Gardino*, 791 F.2d 980, 984 (1st Cir.) (explaining the law of the case doctrine), *cert. denied*, 479 U.S. 888 (1986).

Thus the *de novo* retrial of this action has already provided Cool Light with the only remedy to which it would be entitled even if it could establish breach of a duty of recusal.

Though the point has not been explicitly argued, take account of the fact that Cool Light did not have a new trial before a jury. The reason, however, was Cool Light's own election to waive the demand for a jury in the second trial.

It matters not what Cool Light's reasons of strategy may have been for electing to waive the jury demand for the second trial and to focus its appeal, and all its hope for judgment on a favorable jury verdict, on one contention — the argument on appeal for reversal of Judge NcNaught's order granting a new trial. A party is not entitled to play out its strategic game, seeking to capitalize on what it may reasonably have evaluated as an extraordinarily favorable jury verdict rather than taking chances that a less favorable second verdict would undercut the force of its claim to judgment on the first, and after losing, then for the first time claim foul.

Cool Light made its own considered election to waive the jury demand in the second trial. It is now in no position to assert that the second trial was not the appropriate remedy for an alleged breach of a duty of recusal. For this reason, even if it were assumed that the outcome of an evidentiary hearing might be favorable to Cool Light in other respects, the relief it now seeks would still be inappropriate.

Also, in no event would Cool Light be entitled to reinstatement of the jury verdict, rendered in a trial that, under Cool Light's own contention, was impaired by bias of the presiding judge. A party is not entitled to pick and choose what it likes and dislikes about the trial and the outcome. If it claims a duty of recusal from presiding over the case, arguing, as Cool Light has done, that bias existed during the trial, it is not entitled to ask that nothing about the proceedings except one order — the grant of a new trial — be set aside so the verdict can be reinstated.

In these circumstances, I conclude that it is appropriate, also, to deny all other relief Cool Light seeks in this proceeding, including its request for further discovery. The proposed discovery and evidentiary hearings relate to issues that are not properly addressed in this court in view of the rulings explained above — and the jurisdictional and prudential considerations explained in Part VI below. The request for discovery and for an evidentiary proceeding will be denied, and all subpoenas related to those requests will be quashed.

VI. Jurisdictional and Prudential Considerations Bearing Upon the Scope of Judicial Proceedings

A United States district court should not conduct proceedings bearing upon the merits of serious accusations such as those made by Cool Light in the present instance without having first determined that, if the accusations were proved, (a) the court would have jurisdiction to grant some form of relief to the moving party, and (b) relief should be granted in the particular circumstances of the case. Absent such preliminary determinations, the court, having only the limited jurisdiction authorized by Article III of the Constitution of the United States and by Acts of Congress, would be allowing its processes for the adjudication of cases and controversies within its jurisdiction to be used instead for other purposes.

An Article III court is not a forum for adjudicating the merits of accusations against a retired judge (or, for that matter, even an active judge) of the court. Nor is it a forum for adjudicating the merits of accusations against attorneys on motion of a party in the absence of showing that the party has a justiciable interest — that is, that the party is seeking some relief that the court has jurisdiction and authority to grant to the party for harm caused to that party's legally protected interests.

This point applies to Cool Light's allegations that speculate about how Judge McNaught might have learned of Panagiotou's previous brush with the law. Cool Light makes vague and wholly unsupported accusations of misconduct by the attorneys who represented GTE in the jury trial, one of whom had served for one year as law clerk to Judge McNaught several years before the trial. Moreover, although the allegations are replete with innuendos of intrigue and duplicity, Cool Light proffers no showing that either McCabe or Panagiotou was concerned enough at the time of their alleged observations to report their suspicions to the other or to the

court. *(See* E. McCabe Aff. ¶¶10 - 12 and Panagiotou Aff. ¶¶11, 12.)

The public interest and individual interests of persons accused (including reputational and privacy interests) cannot justify a court's holding a hearing to adjudicate disputes that are not material to any claim for relief over which it has jurisdiction. Other forums exist to serve those interests, if they justify a hearing in some forum. In some instances the forum is completely independent of the Article III court. An example is a forum for consideration of complaints of misconduct of an Article III judge. *See* 28 U.S.C. §372(c) (written complaints alleging that a judge has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may be filed with the clerk of the court of appeals for the circuit). In other instances an appropriate forum may be a branch of a United States district court other than the judge to whom a civil case is assigned by random draw. *See* LR D. Mass. 83.6(5) (provisions regarding disciplinary proceedings against members of the bar of the district).

In either of these kinds of forums for consideration of charges of professional misconduct against a judge or a lawyer, provisions are commonly made for confidentiality of proceedings at an early stage before the adjudicative body has made any determination regarding the sufficiency of the proffer to warrant public exposure of the accusation. *See* 28 U.S.C. §372(c)(14); Mass. SJC Rule 4:01, section 20; Rules of the Board of Bar Overseers §3.22. It is cause for deep concern when an accusation is filed in the public records of a case pending in a United States district court that lacks jurisdiction and authority to adjudicate the merits of the accusation in that case. A practice of allowing such filings would create serious risks of improper use of this forum to make accusations publicly that could not have been made publicly in a forum with jurisdiction and authority to adjudicate the merits of the accusation. The conduct of the officer of the court who files such an accusation raises not only serious issues regarding misuse of this forum but as well serious issues regarding the evasion

of the declared policies of the law regarding confidentiality of proceedings in an appropriate forum.

Moreover, with respect to such accusations against an attorney, jurisdiction of a United States district court to enforce rules of professional responsibility of attorneys, though clear, is not plenary. It is true that the kinds of sanctions that may be imposed upon an attorney may take the form of orders of preclusion or compensatory relief of advantage to an opposing party in a particular civil action. The judge before whom that case is pending may — perhaps even must —exercise jurisdiction for first-instance adjudication. To the extent, however, that sanctions may bear upon the status of an attorney — either one accused or one making an accusation — as a member of the bar, authorized to practice before this and other courts in other cases, one or more among other forums may be appropriate. *See e.g.*, LR D. Mass. 83.6(5) (Rules of Disciplinary Enforcement: Disciplinary Proceedings [against attorneys]); LR D. Mass. 83.6(4)(B) (incorporating Mass. SJC Rule 3.07).

Judicial proceedings in any court, and especially in a court of limited jurisdiction such as a United States district court, must be confined to issues within the court's subject-matter jurisdiction. An attempt by a party to place before the court matters the court cannot properly consider may be rebuffed not only by objection to the court's hearing or considering the matter but even early in the pleading stage, by motion to strike. The court may strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

In a jury trial, it is part of our traditional efforts to assure fair trial that we try to prevent the jury from hearing evidence they cannot properly take into account in decisionmaking, rather than depend on instructing them to disregard. In a nonjury proceeding, the judge often must hear inadmissible matter in order to determine whether it is admissible. It is nevertheless improper for counsel to proffer plainly inadmissible matter in the hope of influencing the judge's decision.

For even stronger reasons, it is improper for counsel to place on the public record, by filing with the clerk of the court, "immaterial, impertinent, or scandalous matter" that counsel has no reasonable basis for contending that the court should consider in determining any issue within its jurisdiction.

The processes of the court for administering justice will have been misused if it is determined that, in the present case, Cool Light has proffered no explanation of any reasonable basis for its contending that some of the materials placed on the public record in this case are matters the court can properly consider in deciding any issue before the court in this case. An example is a juror affidavit that the juror had "a general impression that Judge McNaught ... was biased in favor of GTE." (M. Fischer Aff. ¶5 attached to plaintiff's mot. seeking relief from judgment.) This, of course, is not a witness "testifying as an expert," Fed. R. Evid. 701. Thus, the affidavit is not admissible unless it is shown to be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Id.* Proffered evidence cannot meet requirements stated in the first phrase of (b) "helpful to a clear understanding of the witness' testimony" unless the witness has in some other part of the proffered testimony said something that satisfies the requirement of the second phrase — "helpful to ... the determination of a fact in issue." The affidavit of the juror in this instance gives no factual support for the alleged "impression" of bias — an opinion or conclusion of the affiant — and does not purport to be based on anything other than observation of the judge's conduct in the performance of judicial functions. The nature of judicial conduct during proceedings is subject to review on appeal, on properly premised grounds, and is not, generally, a basis for recusal. *See e.g., Aggarwal* v. *Ponce School of Medicine,* 837 F.2d 17, 22 (1st Cir. 1988) ("To sustain a charge of improper [judicial] conduct, ..., the reviewing court must find that a party was so seriously prejudiced as to be deprived of a fair trial.") (citation omitted).

It is especially important that rules about competence of jurors as witnesses and about admissibility of evidence from them, by affidavit or otherwise, be respected by members of the bar of the court as well as the court itself. The law's general policy of protection of jurors has given rise to some quite particularized rules. An example is the prohibition against inquiry into validity of a verdict.

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that *or any other juror's mind or emotions* as influencing the juror to assent or dissent from the verdict . . ., except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear *upon any juror*. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b) (emphasis added). The emphasized phrases in this quotation make clear that the rule of preclusion goes beyond just excluding a juror's testimony about his or her own mind. Even so, this particularized rule does not extend far enough to apply to the matter now before this court. Nevertheless, the policy underlying the rule has at least equal if not greater force in the present context. I conclude that the testimony of a juror concerning the juror's opinion — or a recitation of the juror's perception of the behavior of the judge during judicial proceedings on the basis of which the juror formed that opinion — is not admissible evidence in judicial proceedings to which the Federal Rules of Evidence apply.

VII. Grounds of Preclusion Relevant to Cool Light's Claims for Relief

Independently of the grounds explained in Parts V and VI for denying all relief requested by Cool Light in motions now before the court, conduct of Cool Light and its authorized agents invokes precedents for precluding any relief that might otherwise have been appropriate.

A. *Cool Light's Post-verdict Contact with Jurors*

Cool Light claims that its conduct in gathering the evidence it proffers to support its motion was permissible under the law applicable to attorneys who practice in the Commonwealth of Massachusetts. (Cool Light's reply memorandum, dated Dec. 22, 1992 at 5.) It argues in the alternative that, to the extent its conduct was questionable, "the ethical prohibitions [of this Circuit] are not entirely precise. . . ." (*Id.* at 6.) Both contentions lack merit.

First Circuit law governing attorney and party contact with jurors post-verdict is, and was at the time of the jury trial in this case, entirely clear in prohibiting correspondence and communication of the kind that admittedly occurred in this case.

> [T]his Circuit prohibits the post-verdict interview of jurors by counsel, litigants, or their agents except under the supervision of the district court, ***and then only in such extraordinary situations as are deemed appropriate.*** Permitting the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties.

United States v. *Kepreos*, 759 F.2d 961, 967-68 n.5 (1st Cir.) (emphasis added), *cert. denied*, 474 U.S. 901 (1985); *accord*

Dall v. *Coffin*, 970 F.2d 964, 972 (1st Cir. 1992). The record shows that Judge McNaught, in his post-verdict instructions to the jury, in the presence of Cool Light's attorneys and others, explained that the attorneys were prohibited from talking to the jurors about their deliberations and cited *Kepreos*. (Trial Tr., vol. 26 at 20, attached to E. McCabe 2d Aff.)

The facts speak for themselves. Plaintiff corporation's president Panagiotou telephoned the foreperson of the jury, encouraging him to telephone plaintiff's attorney. The unrefuted fact is that the juror's calls to McCabe *were* solicited, if not by McCabe then by Panagiotou who was Cool Light's "agent." Nothing is proffered by Cool Light to explain what prompted Panagiotou to call Koerner. Nor does Cool Light purport to provide a full account of this conversation. Juror Koerner's statement that he "was pleased to hear from Panagiotou" (Koerner Aff. ¶2) does not excuse Panagiotou's actions. Plaintiff's attorney accepted the calls of one juror after another with the knowledge that Panagiotou had participated in prompting the calls. The attorney gathered information from the jurors, and apparently, prepared affidavits for their signatures.

Plaintiff's tortured attempts to define and give to the word "interview" a contextual meaning permitting this conduct are to no avail. The argument that no "interview" of any juror took place approaches, if not crosses the line into, the frivolous. Although attorney McCabe may not have "initiated" the contact in the first instance, Panagiotou, by his own testimony, did make the first call, and McCabe by his actions encouraged the violation of the First Circuit prohibition. McCabe had a responsibility to know that actions such as those of Panagiotou violated the First Circuit's mandate, and, once informed of Panagiotou's actions, to do everything possible to discourage further violation. Instead, he expanded the violation.

Attorney McCabe's conduct exceeded the bounds of conduct permitted of an officer of the court. His failure to know those

bounds is no excuse. If he knew in general about the First Circuit's firm rule on this subject and thought he had arguable grounds that his proposed course of conduct was not a violation, his failure to bring the matter to the attention of the court and seek court authorization for contact with jurors was inexcusable. Attorney McCabe chose instead to proceed first with a forbidden course of conduct and then present to this court an argument that, viewed most charitably, does not even measure up to what the First Circuit has recently described as "complicated, counterintuitive and ultimately wrong." *Laborde-Garcia* v. *Puerto Rico Telephone Co.*, No. 92-2287 (1st Cir. May 18, 1993), slip op. at 9. Moreover, as the First Circuit added in that case, with respect to an argument in support of a claimed qualified immunity of a public official on the ground that constitutional protection for a property interest was not clearly established:

> [W]e do not believe that the potential existence of an unusual, sophisticated, and ultimately wrong legal argument, is sufficient, legally speaking, to muddy what, for immunity purposes, would otherwise amount to clear legal waters. Were that not so, given the ingenuity of the bar, "qualified immunity" would become absolute in that it would become available in virtually any case argued by a creative lawyer.

Id. at 9-10. Creative word play is not an excuse for violation by an officer of the court of a rule of law as clear and explicit as the First Circuit's rule regarding post-verdict contact with jurors.

Moreover, the precise details of the facts regarding who initiated contacts in this instance, though they may be material to the issue of knowing violation or reckless disregard, are immaterial to determining that a violation of the First Circuit law against post-verdict contact with jurors did occur. Even if the jurors initiated the contacts and were zealous in their pursuit of McCabe, he remained responsible

for knowing the boundaries of the law and complying with them. McCabe's portrayal of himself as a mere conduit for the four jurors' concerns (McCabe 2d Aff. ¶13) does not relieve him of his responsibilities as an officer of the court for compliance with the First Circuit law on this subject. McCabe distorts both the spirit and the letter of that law in arguing that the First Circuit only prohibits those contacts retrospectively appraised as constituting harassment. No such limitation is either expressed or reasonably to be perceived as implicit in any First Circuit precedent.

GTE suggests factual issues as to whether harassment of the jurors may have, in fact, taken place, despite Cool Light's contrary portrayal of the matter. GTE, by affidavits of attorney Allan van Gestel and Carol A. Huban, secretary to van Gestel, relay the following information. Huban states that on September 16, 1992 she answered van Gestel's direct line and spoke with a man who identified himself only as a juror in the first Cool Light trial and asked to speak with van Gestel. (Huban Aff. ¶2.) Huban put the caller on hold and relayed the information to van Gestel. (*Id.* ¶3.) According to Huber, van Gestel indicated that "he was uncertain whether it was proper for him to speak to the juror" and instructed Huber to advise the caller to call back in two days by which time van Gestel would have checked the law and ethical rules. (*Id.* ¶3.)

According to Huber, after she relayed this message, the caller stayed on the line and described to her the reason for his call. (*Id.* ¶4.) Afterward Huber, at the request of van Gestel, typed a memorandum to the file recording the conversation. This memorandum is submitted to the court with Huban's affidavit. Huber's memorandum states: "He [the caller] stated that one of the other jurors has contacted the McCabe Group, and the McCabe Group is going to put together an Affidavit to be signed by some of the jurors, who are upset with the fact that the matter was overturned." *(Id.)*

According to Huber's memorandum, the caller stated that another juror had contacted him by mail, notifying the caller that he had "contacted the McCabe Group with a package of

information," and encouraged the caller to contact the McCabe Group if he wanted "to become involved." (Huber Aff. (Memorandum to File).) With the letter, according to the caller, were regulations entitled "Investigation of Jurors." *(Id.)*

Most troubling to the court is the following statement Huber's memorandum attributes to the caller: "The anonymous man said he didn't want to sign the Affidavit and he doesn't know how to stop him [the other juror]." *(Id.)*

The court has an obligation to protect jurors against harassment by litigants in connection with their jury service. It is true that the law of the First Circuit does not prevent jurors from contact among themselves. Nevertheless, any actions of Panagiotou and McCabe that might be construed as encouraging or facilitating juror-to-juror contacts to stir up support for Cool Light's position is a very different matter.

At this time, however, I do not undertake to make findings of fact regarding the potential scope of misconduct that this evidence raises. For the reasons explained in this Memorandum, I conclude that the appropriate actions for the court to take on the matters now pending before the court do not depend on such findings.

Even assuming Panagiotou and McCabe did not take any action to encourage juror-to-juror contact, I find that the post-verdict contacts Panagiotou and McCabe made were violations of the First Circuit law regarding post-verdict contact with jurors. For this reason, independently of the grounds explained in Part V, I conclude that it is appropriate to deny Cool Light's request to interview the jurors who, in spite of Koerner's entreaties, have chosen not to come forward.

B. *An Attorney's Responsibilities, as Both Advocate and Officer of the Court, when Alleging Misconduct of a Judge and an Opposing Attorney*

McCabe's delay in investigating the controlling law and bringing this motion to the attention of the court in a timely

manner is not excused by his claimed lack of familiarity with prevailing First Circuit law or his recuperation from surgery.

First, the court cannot accept, as an excuse, McCabe's protests of unfamiliarity with the First Circuit law governing contact with jurors. It is his duty as a member of the bar of this court to know that law. Also, Judge McNaught's post-verdict instructions to the jurors in McCabe's presence gave McCabe actual notice of the existence of this body of law. Second, McCabe is not a sole practitioner but a named principal in a law firm. All the pleadings in this case bear the names of three attorneys certified to practice before this court. McCabe has not explained why he was the only person in his firm able to conduct the necessary legal research into the law bearing upon this matter.

The court is troubled also by McCabe's dual role as witness and attorney at the same time on the primary claim for relief that he and his client seek to present to the court at this time. *See Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d 671, 674 n.1 (1st Cir. 1992) (expressing concern about "counsel's decision to make herself a potential witness in pretrial proceeding" and noting potential impact on both attorney/client and attorney/court relationship). *See also* LR D. Mass. 83.6(4)(B) (incorporating Mass. SJC Rule 3:07, DR5-102 (concerning attorney as witness)). McCabe's supplementary affidavit dramatically illustrates the wisdom of prohibition against an attorney's simultaneously serving as witness and advocate. The supplementary affidavit reads more like a brief, arguing law and inferences, than a statement limited to a recitation of admissible testimony — or even testimony for which the advocate could at least assert a plausible argument for admissibility. The affidavit, on its face, evinces insensitivity of the affiant to his duty to the court to limit the affidavit to testimony and make his arguments separately in a memorandum or brief.

I note also that Cool Light has made serious allegations publicly, by filings with the Clerk, without advance notice to Judge McNaught, to the attorneys accused of serious pro-

fessional misconduct, or to the trial judge currently assigned to the case. As was plainly to be expected, the charges have been reported in the press. The submissions before the court, however, are totally lacking in admissible evidence, by affidavit or otherwise, to support findings of fact sustaining these serious charges. This course of action is contrary to the statutory provisions for protection against public airing of unsubstantiated allegations in the context of complaints against judges, a forum for which is provided under 28 U.S.C. §372(c)(14). If that statute is not directly in point here, it is at least instructive by way of comparison.

VIII. Conclusions

For the reasons explained in Parts III-VII above, I conclude that Cool Light's motion for relief from the Final Judgment for GTE in this case and from various orders that preceded the Final Judgment must be denied.

For the reasons explained in Part III and in Parts VI and VII, I conclude that there is a prima facie basis for believing

> (1) that Cool Light and its lead counsel, Edwin A. McCabe, and its principal officer, George Panagiotou, in violating the law of the First Circuit with respect to post-verdict contact with jurors, each did so knowingly, and in the alternative did so with the state of mind of willful blindness to and reckless disregard for the law of the First Circuit regarding post-verdict contacts with jurors;
>
> (2) that Cool Light and Edwin A. McCabe violated Rule 11 of the Federal Rules of Civil Procedure;
>
> (3) that Edwin A. McCabe violated Mass. SJC Rule 3:07, DR5-102 (concerning lawyer as witness); and
>
> (4) that sanctions, if any are determined to be appropriate in this forum, either in lieu of or in addition to sanctions that may be appropriate in some other forum, may include monetary or other sanctions provid-

ing some degree of compensatory relief to GTE and to other persons against whom Cool Light has made accusations in these proceedings.

An order will be issued scheduling a hearing to consider whether the court should (a) find that each of the violations described in paragraphs (1) - (3) above was committed, and (b) impose appropriate sanctions. The Clerk will set forthwith a conference with counsel for all interested persons, to hear proposals from all counsel and set a schedule for a show-cause hearing, if appropriate, and for prompt disposition of all matters remaining for determination.

Because of the First Circuit policy against piecemeal appeals and the pendency of issues regarding sanctions that remain for determination, the court does not make a Final Order at this time. Instead, only an Interlocutory Order is to be entered.

INTERLOCUTORY ORDER

For the foregoing reasons, it is Ordered:

(1) The court DENIES the requests for oral argument on the following motions: Cool Light's motion for relief (at 5); motion of Palmieri to quash and for protective order (at 2); Cool Light's motion seeking permission to interview jurors (at 2); Cool Light's motion for appointment of a magistrate judge as Special Master (at 4).

(2) The court DENIES the motion of Cool Light for relief from orders and judgment (Docket No. 242, filed Dec. 1, 1992).

(3) The court ALLOWS the motion of GTE to quash all deposition subpoenas and for entry of protective order (Docket No. 247, filed Dec. 14, 1992).

(4) The court ALLOWS the motion to quash subpoenas of Judge John J. NcNaught, Elisabeth Medvedow, Mary Lou Moran, and Patricia Casey-Price (Docket No. 250, filed Dec. 15, 1992).

(5) The court ALLOWS the motion of Ann L. Palmieri to quash deposition subpoena and for protective order (Docket No. 255, filed Dec. 15, 1992).

(6) The court ALLOWS the motion of Charles Donelan to quash subpoena (Docket No. 258, filed Dec. 15, 1992).

(7) The court DENIES the motion of Cool Light seeking permission to interview jurors (Docket No. 261, filed Dec. 22, 1992).

(8) The court DENIES Cool Light's motion for appointment of a magistrate judge as Special Master (Docket No. 270, filed Jan. 28, 1993).

(9) The court has determined that there is a prima facie basis for believing

> (1) that Cool Light and its lead counsel, Edwin A. McCabe, and its principal officer, George Panagiotou, in violating the law of the First Circuit with respect to post-verdict contact with jurors, each did so knowingly, and in the alternative did so with the state of mind of willful blindness to and reckless disregard for the law of the First Circuit regarding post-verdict contacts with jurors;
>
> (2) that Cool Light and Edwin A. McCabe violated Rule 11 of the Federal Rules of Civil Procedure; and
>
> (3) that Edwin A. McCabe violated SJC Rule 3:07, DR5-102 (concerning lawyer as witness).

A conference is set for 9:00 a.m., June 29, 1993, to schedule further proceedings at which all parties may be heard with respect to whether each such violation has occurred and, if so, what if any, compensatory sanctions should be imposed on Cool Light, George Panagiotou, and attorney Edwin A. McCabe.

s/ Robert E. Keeton

United States District Judge

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY, INC.,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

Memorandum
August 12, 1993

PART VII of the Memorandum of June 7, 1993 addressed possible grounds for precluding Cool Light's claims for relief from the final judgment in this case that are independent of the reasons for precluding relief explained in Parts V and VI.

Part VIII addressed the need for a show-cause hearing and further findings by the court before a final adjudication of issues discussed in Part VII. A further hearing on these matters was also necessary to determining whether sanctions, under Fed. R. Civ. P. 11 or any other authority, might appropriately include awards to GTE and others, reimbursing them for attorney fees incurred by them in responding to Cool Light's claims for relief from judgment.

At the further hearing of August 6, 1993, counsel for GTE and each other person who might have sought attorney fees advised the court that because of their clients' interests in closing this matter promptly and finally they would not press any request for attorney fees or sanctions. In these circumstances, weighing the interests of all parties in prompt entry of a Final Order closing all proceedings in this court in this

case, and the undesirability of imposing upon parties (who might benefit from a sanction, which included an award of attorney fees) delays and expenses incident to further proceedings they did not request, the court determined that it should not, *sua sponte*, impose any sanction or conduct any further proceedings.

Accordingly, the court directed that the Clerk enter a Final Order forthwith.

s/ ROBERT E. KEETON

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

FINAL ORDER
August 6, 1993

On the findings and conclusions and for the reasons stated in the Memorandum and Order of June 7, 1993, and supplemental findings, conclusions, and reasons stated on the record at the hearing of August 6, 1993, it is ORDERED:

(1) The court DENIES the motion of Cool Light for relief from orders and judgment (Docket No. 242, filed December 1, 1992).

(2) No party having elected to press a request for sanctions, and the court having determined that it should not, *sua sponte*, impose any sanction, the court determines that all pending matters have been resolved and directs that the Clerk close the file in this case.

(3) Costs of the proceedings on Cool Light's motion for relief from orders and judgment are awarded against Cool Light.

s/ ROBERT E. KEETON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1896 & 93-1897

COOL LIGHT, COMPANY,
PLAINTIFF, APPELLANT,

v.

GTE PRODUCTS, CORPORATION,
DEFENDANT, APPELLEE.

ORDER OF THE COURT

TORRUELLA, *Circuit Judge,**
SELYA, *Circuit Judge,*
CYR, *Circuit Judge,*
STAHL, *Circuit Judge.*

Entered: June 16, 1994

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

s/ FRANCIS P. SCIGLIANO

FRANCIS P. SCIGLIANO, Clerk

*Chief Judge Stephen Breyer did not participate

[cc: McCabe and van Gestel]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY, INC.,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

PLAINTIFF'S MOTION SEEKING RELIEF FROM ORDERS AND JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)(6)

The plaintiff, Cool Light Company, Inc., hereby moves, pursuant to Fed. R. Civ. P. 60(b)(6), for relief from certain orders and proceedings — and the December 11, 1991 judgment — in the above-captioned action.

The Grounds For Relief

The factual grounds for this motion are set forth in the affidavits of four members of the jury who served at the trial in 1990 and who were privy to comments made by the Court (McNaught, J.) which disclosed both partiality and consideration of facts outside the record of the case, and the affidavits of Mr. Panagiotou and plaintiff's counsel, which are attached to this motion as Exhibits "A" through "F." The legal grounds for this motion are more fully set forth in a memorandum of law submitted in support of it.

The affidavits which support this motion establish that District Judge John J. McNaught, who presided over the trial of this action in 1990, acted in violation of his oath of office and

of a federal statute — 28 U.S.C., Sec. 455(a) and (b) — by failing to recuse himself after obtaining prejudicial information outside the record about the president of the plaintiff corporation, George Panagiotou, whose testimony at trial was critical to the plaintiff's case. The conduct of Judge NcNaught — once revealed[1] — not only gave the appearance of impropriety and partiality; his own post-trial statements in chambers to the jury provide clear and convincing evidence that the information which he somehow obtained about 1976 criminal charges brought against Mr. Panagiotou (charges later dismissed on the government's motion prior to trial) caused him to have a personal bias or prejudice against the plaintiff and its claims in this action. Because of such bias and prejudice — Judge McNaught expressly noted that he did not believe Mr. Panagiotou's trial testimony[2] — the validity and propriety of each order, proceeding and judgment identified in this motion is at best suspect. Taken together, Judge McNaught's orders and rulings have had the effect of denying plaintiff the benefit of both the jury's verdict and the fair deliberations of an unbiased Court.

The Court's findings and rulings on those claims reserved by Judge McNaught for his determination were not the subject of retrial. The eventual appellate review and affirmation of those findings and rulings, and of Judge McNaught's grant of a new trial on those claims found by the jury in plaintiff's favor, were the product of appellate scrutiny based upon an abuse-of-discretion standard. The review sought by this motion is, with respect to the orders, proceedings and judgment at issue, a *de novo* review by a judge of this Court.

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[1]Plaintiff first became aware of the facts upon which this motion is based at the end of September, 1992; the process of verifying those facts continued up to one week prior to the filing of the motion.

[2] Selected portions of the transcript of proceedings on June 29, 1990, are attached to this motion as Exhibit "G".

The Relief Sought By This Motion

The plaintiff moves that the orders, proceedings and judgment described in subparagraphs (a) through (e) below be vacated, and further seeks the ancillary relief described in subparagraphs (f) through (j) from the Court:

(a) The findings of fact and rulings of law made by the Court (McNaught, J), on June 29, 1990;

(b) Any findings of fact and rulings of law deemed to have been made by the Court (McNaught, J.) on August 2, 1990;

(c) The memorandum and order on proposed orders of judgment and motion for judgment n.o.v. (McNaught, J.) dated August 9, 1990;

(d) The order of the Court (McNaught, J.), dated August 29, 1990, denying plaintiff's motion for reconsideration or, in the alternative, for reduction in amount of compensatory damages; and

(e) The final judgment of the Court (Keeton, J.) dated December 11, 1991.

(f) That plaintiff's counsel be granted leave, in accordance with DR 7-108(D) of the Canons of Ethics, Disciplinary Rules, of the Supreme Judicial Court of Massachusetts, to initiate communication with one or more of those members of the jury to which this case was tried in 1990 who have not, to date, communicated with plaintiff's counsel;

(g) That plaintiff be allowed to supplement the record with respect to this motion by submitting any relevant evidence it may be able to discover between the date of filing of this motion and the date of any hearing which the Court may schedule with respect to it;

(h) That the evidence at the 1990 trial be reviewed *de novo* by a judge of this Court to determine the merits of the defendant's post-trial motion for judgment notwithstanding the verdict, or for a new trial

on grounds that the jury's verdict was contrary to the weight of the evidence;

(i) That the evidence at the 1990 trial be reviewed *de novo* by a judge of this Court to determine the merits of those claims decided by the Court (McNaught, J.) adversely to the plaintiff; and

(j) That unless grounds are found for allowance of the defendant's post-trial motions referred to in sub-paragraph (h) above, the verdict of the jury be reinstated *nunc pro tunc* to June 29, 1990, and appropriate final judgment be entered thereon.

Or in the alternative:

(k) That a new trial be granted with respect to the plaintiff's claims against the defendant.

The Timeliness Of This Motion

This motion is made within a reasonable time after plaintiff's counsel was contacted by jurors and made aware of, and able to verify, the facts upon which it is based. It is also made within one year of the date when judgment in the case was entered.[3]

Request For Oral Argument

A hearing with respect to this motion is requested pursuant to Rule 7.1(D) of the Local Rules of this Court.

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[3] Mr. Panagiotou's and Mr. McCabe's affidavits contain information about *ex parte* access to Judge McNaught's chambers by one of the defendant's lawyers, a former law clerk to Judge McNaught. Plaintiff intends to pursue the source or sources of the Court's information about the 1976 criminal charges against Mr. Panagiotou and reserves the right to amend this motion to seek, in the alternative, relief under Fed. R. Civ. P. 60(b)(3) because of adversarial misconduct.

Certification Of Conference Of Counsel

Plaintiff's counsel, Edwin A. McCabe, certifies pursuant to Rule 7.1(A)(2) of the Local Rules of this Court that he conferred with Allan van Gestel, Esq., defendants counsel, at a meeting on November 30, 1992, and that they attempted in good faith — but without success — to resolve or narrow the issues presented by this motion.

Cool Light Company, Inc.
by its attorneys,

s/ C. C. McCabe

Edwin A. McCabe BBO #327040
Karen Chinn Lyons BBO #551832
Joseph P. Davis III BBO #551111
The McCabe Group
Twenty-Five First Street
Cambridge, MA 02141-1810
(617) 494-1110

Dated: November 30, 1992

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above document was served by hand on the 30th day of November, 1992, on counsel of record for the defendant.

s/ E. A. McCabe

AFFIDAVIT

WILLIAM KOERNER, on his oath deposes and says as follows:

1. I reside at 283 South Street in Carlisle, Massachusetts. I was a member — in fact, the foreman — of the jury in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-Mc, which was tried in May and June of 1990. I am making this affidavit to record my memory of certain events which occurred at and after the trial of the case.

2. This affidavit is being prepared and executed at the request of counsel for the plaintiff, Cool Light Company, Inc. ("Cool Light"), and the principal of that company, George Panagiotou. On September 9, 1992, I received a telephone call from Mr. Panagiotou — the first communication of any kind that I had had with him — and he asked me to contact Mr. McCabe, his company's counsel. I was pleased to hear from Mr. Panagiotou and I promptly did as he requested.

3. In my first telephone conversation with Mr. McCabe, he explained that we were not at liberty to discuss any aspect of the jury's deliberations in the case, and we did not then — or at any time thereafter — do so. I did, however, tell Mr. McCabe in our first telephone conversation of my belief that the jury's verdict in the case was proper, that there was nothing confused or inconsistent about it, and that I felt the jury had duly considered the evidence as to both liability and damages, and had carefully answered the questions submitted to it by Judge McNaught. I also told him that we had calculated the damages we awarded by spreading out numbers on the blackboard in the jury room, and that there was no question in my mind that, had the jury been asked, we could have cleared up any confusion that there may have been in Judge McNaught's mind about our verdict.

4. Also in our first telephone conversation, I shared with Mr. McCabe the fact that I had corresponded with Judge McNaught after learning in the newspaper that our verdict

had been set aside, and I undertook to provide him with copies of that correspondence (copies of which are attached to this affidavit as Exhibits "A" and "B").

5. In that first conversation, I did not relate to him the events which occurred in Judge McNaught's chambers following the discharge of the jury, the events which are described below in this affidavit. I was unsure whether I could properly discuss such matters with Mr. McCabe, so I said nothing at the time. In late September, on my own initiative, I again called Mr. McCabe, and in that telephone conversation informed him that I had been — and continued to be — troubled by the events in chambers, and then I related those events to him.

6. Shortly after the jury had been ushered into Judge McNaught's chambers, after rendering its verdict, Judge NcNaught joined us. One of the first things that he said to us was that he disagreed (strongly or totally — I am not sure which he said) with our verdict in favor of Cool Light. He then added that he had information to the effect that Mr. Panagiotou had been involved with, or mixed up in, drugs. I cannot recall Judge McNaught's exact words; I did, however, confirm my general memory of what he had said with other jurors in the case, and they confirmed the accuracy of my memory of events.

7. There was no evidence in the case having anything to do with drugs of any kind, and I could not understand why Judge McNaught was telling us such a thing. He then moved on to other topics of conversation — showing a friendly interest in who we were, what we did, and so on — and nothing further was said that I can recall about either our verdict or Mr. Panagiotou and drugs. It disturbed me that Judge McNaught spoke to us of such a matter, and I have been bothered to this day by the possibility that our verdict was later nullified by Judge NcNaught for reasons other than those stated in his August 9, 1990, Memorandum and Order, a copy of which he had sent to me. I communicated that concern to Mr. McCabe, and I also urged other jurors to contact him

and to give him the benefit of their memory of events. I am informed that at least some of them did so.

8. I met with Mr. McCabe — and with a lawyer named Lawrence Sager — in early October, and I went over with them in detail the events described in this affidavit. I also agreed to sign an affidavit setting forth what had happened. After this affidavit was prepared for my review, I satisfied myself as to the truth and accuracy of each of the statements made in it.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 28th day of October, 1992.

s/ William Koerner

William Koerner

283 South Street
Carlisle, MA 01741
September 10, 1990

Judge John J. McNaught
U.S. District Court
633 Post Office & Courthouse Bldg.
Boston, MA 02109

Dear Sir:

I recently served on the jury for the George Panogiotou VS GTE case in your courtroom. I was dismayed to read recently that a "U.S. District Court judge" set aside our verdict and a new trial will be held.

I have discussed this event with a few others who served on the jury with me, and we all are experiencing a great sense of futility about the time we spent on the case and the amount of money the court system expended only to have our efforts appear to have been overruled.

It would be helpful for me to have some explanation of why our verdict was set aside. I found the experience of being a juror to have been interesting and informative and need some further information to confirm that my time was of some value to the process.

I look forward to hearing from you and will share your response with others on the jury. It was a pleasure to have met you and we all enjoyed your personal interest in us as individuals.

Thanking you in advance,

Sincerely,

William W. Koerner

UNITED STATES DISTRICT COURT
Post Office and Courthouse Building
Boston, Massachusetts 02109

Chambers of
JOHN J. MCNAUGHT
District Judge

September 11, 1990

Mr. William W. Koerner
283 South Street
Carlisle, MA 01741

Dear Mr. Koerner:

Inasmuch as I may be the judge who presides over the new trial in the Cool Light v. GTE case, it would be inappropriate for me to reply to the comments you made in your letter of September 10th.

However, I am enclosing a copy of my decision of August 9, 1990 "Memorandum and Order on Proposed Orders of Judgment and on Motion for Judgment, N.O.V." for your review. I hope it will be helpful.

Very truly yours,

s/ JOHN MCNAUGHT

JOHN J. MCNAUGHT
United States District Judge

Enclosure

AFFIDAVIT

MAE FISCHER, on her oath, deposes and says as follows:

1. I reside at 72 Monomesset Way in Chatham, Massachusetts. I was a member of the jury in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-Mc, which was tried in May and June of 1990. I am making this affidavit to record my memory of certain events which occurred at and after the trial of the case.

2. This affidavit is being prepared and executed at the request of counsel for the plaintiff, Cool Light Company, Inc. ("Cool Light"). On mid-September of this year, I received a written note from William Koerner, who had acted as foreman of our jury, asking me to contact Mr. McCabe, who I knew to be Cool Light's counsel. I did as he requested a little more than a month later, on October 19, 1992. Mr. McCabe returned my call the following day.

3. I told Mr. McCabe of my belief that the jury verdict which we had rendered was the product of careful consideration of the evidence which had been presented at the trial. I also told him that I had worked in a lawyer's office and that I could not understand how it was that Judge McNaught had the power to nullify the jury verdict which we had rendered. I also volunteered information about Judge McNaught's comments to the jury in his chambers following our discharge.

4. Shortly after the jury had been seated in Judge McNaught's chambers, after rendering its verdict, Judge NcNaught joined us. One of the first things that he said to us was that he disagreed strongly with our verdict in favor of Cool Light. He then said something to the effect that I guess no one on the jury realized that Mr. Panagiotou, Cool Light's principal, had been involved with drugs. He offered that as something that he knew, and that we obviously did not. I do not recall if he offered any other details. In my mind, there was a definite connection between Judge NcNaught's disagreement with our verdict and what he then said about Mr. Panagiotou and drugs.

5. It was also my general impression that Judge McNaught whose former law clerk we knew was a member of the trial team representing GTE — was biased in favor of GTE. That was something I was concerned about, but I believed that the jury ultimately had the power to decide the case and that there was really nothing the judge could do to advance the interests of one said of the case to the detriment of the other.

6. I met with Mr. McCabe and went over with him in detail the events described in this affidavit. This affidavit was prepared by him for my review. Before signing it, I satisfied myself as to the truth and accuracy of each of the statements made in the affidavit.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 25th day of October, 1992.

s/ MAE FISCHER

MAE FISCHER

AFFIDAVIT

RICHARD SWIFT, on his oath, deposes and says as follows:

1. I reside at 1 Simmons Lane in Billerica, Massachusetts. I was a member of the jury in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation,* Civil Action No. 86-2668-Mc, which was tried in May and June of 1990. I am making this affidavit to record my memory of certain events which occurred at and after the trial of the case.

2. This affidavit is being prepared and executed at the request of counsel for the plaintiff, Cool Light Company, Inc. ("Cool Light"). On mid-September of this year, I initiated telephone contact with Mr. McCabe, who I knew to be Cool Light's counsel, on October 13, 1992, after speaking with William Koerner, the foreman of our jury.

3. In my first telephone conversation with Mr. McCabe, he explained that we were not to discuss the jury's deliberations, and we did not do so, then or at any other time.

4. I told Mr. McCabe about the statement made by Judge McNaught in his chambers following our verdict and discharge. I told him that Judge McNaught, immediately upon coming into his chambers where the jury had assembled at his direction, said to us was that he disagreed strongly with our verdict in favor of Cool Light. He then said something to the effect that he had information that Mr. Panagiotou, Cool Light's principal, had been involved with, or mixed up in, dealing in drugs. I am a retired pharmacist, and the implications of what the judge was saying immediately struck me, although I could not understand what it had to do with our verdict in the case.

5. I have confirmed my general memory of what Judge McNaught said to the jury in his chambers with one or more of the other jurors in the case, and they have confirmed the accuracy of that memory.

6. I agreed to sign an affidavit setting forth what had happened. After consultation with me, this affidavit was prepared

for my review. Before signing it, I satisfied myself as to the truth and accuracy of each of the statements made in the affidavit.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 12th day of November, 1992.

s/ RICHARD SWIFT

RICHARD SWIFT

AFFIDAVIT

JANET LIVESEY, on her oath deposes and says as follows:

1. I reside at 556 Lowell Street in Wakefield, Massachusetts. I was a member of the jury in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-Mc, which was tried in May and June of 1990. I am making this affidavit to record my memory of certain events which occurred at and after the trial of the case.

2. This affidavit is being prepared and executed at the request of counsel for the plaintiff, Cool Light Company, Inc. ("Cool Light"). On September 29, 1992, I received a telephone call from William Koerner, who had acted as foreman of our jury, who asked me to contact Mr. McCabe, who I knew to be Cool Light's counsel. I immediately did as he requested. Mr. Koerner and I had spoken on more than one occasion about the events which occurred after we had rendered our verdict, and of our shared dismay concerning those events.

3. In that first telephone conversation with Mr. McCabe, he explained that it would not be proper for us to discuss the jury's deliberations, and we did not do so, then or at any other time. I did tell him of my belief that the jury verdict which we had rendered was the product of careful consideration of the evidence which had been presented at the trial. I told him that I had obtained, on my own initiative, a copy of Judge McNaught's August 9, 1990, Memorandum and Order, and that I could not — and still cannot — understand why Judge McNaught, if he felt that our verdict was somehow confusing or inconsistent, had not simply asked the jury further questions to clear up such matters. I also volunteered information about Judge McNaught's comments to the jury in his chambers following our discharge.

4. Shortly after the jury had been seated in Judge McNaught's chambers, after rendering its verdict, Judge NcNaught joined us. One of the first things that he said to us was that he disagreed totally with our verdict in favor of

Cool Light. In the next breath, he said something to the effect that Mr. Panagiotou, Cool Light's principal, was not a man of good character, and that he (Judge McNaught) had information about a specific incident — which I believe he placed in either an airplane or an airport — in which Mr. Panagiotou had been involved with, or mixed up in, dealing in drugs. In my mind, there was a definite connection between Judge McNaught's disagreement with our verdict and what he then said about Mr. Panagiotou and drugs.

5. I have confirmed my general memory of what Judge McNaught said to the jury in his chambers with one or more of the other jurors in the case, and they have confirmed the accuracy of that memory. On October 22, 1992, I spoke by telephone with one of the other jurors, Christina Szoka-Rheaume. She reminded me that Judge McNaught had told us that the incident involving Mr. Panagiotou and drugs had occurred at Hanscom Field in Bedford, Massachusetts.

6. I met with Mr. McCabe — and with a lawyer named Lawrence Sager — in early October, and I went over with them in detail the events described in this affidavit. I also agreed to sign an affidavit setting forth what had happened. After further consultation with me, this affidavit was prepared for my review. Before signing it, I satisfied myself as to the truth and accuracy of each of the statements made in the affidavit.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 28th day of October, 1992.

s/ JANET LIVESEY

JANET LIVESEY

AFFIDAVIT

GEORGE PANAGIOTOU, having been duly sworn, deposes and says as follows:

Introduction

1. I am, and have been since the incorporation of the company, the President of Cool Light Company, Inc. ("Cool Light), the plaintiff in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-Mc, which was tried in May and June, 1990. I am making this affidavit in support of a motion by Cool Light, which I anticipate will be filed within a matter of days, which will seek, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to vacate various orders of the District Court, including the judgment entered in this action on December 11, 1991, and other, ancillary, relief.

2. I attended the trial of this action in May and June of 1990. I was present in Court on each trial day, from the opening arguments to the close of the trial phase of the case on June 29, 1990.

The "Drug Incident"

3. In late April, 1976, I was in Florida on a combined business and vacation trip. I was, at the time, 34 years old and a resident of Brookline, Massachusetts. I was employed as Vice President of Art Bodkins Optics, Inc., and involved in the development of lighting products.

4. Toward the end of my Florida stay, I telephoned a longtime friend in Florida — Fred Galiatsatos — and learned that he was about to fly to Boston to visit his parents. I had known Fred since childhood; his parents and mine were very close friends, and I believe our families escaped from Romania in the same year — 1950 — and relocated in Greece, where I met him.

5. Fred told me that he owned an aircraft, and that after a trip for a few days "to the islands", he would be flying to Boston. He invited me to fly with him in his plane to Boston. I accepted his invitation, and three days later, following the directions he had given me, I met him at an airport in Miami.

6. Fred — acting as pilot — and I were the only people on the aircraft when it departed the Miami area for the flight to Boston. I was sitting in the right-hand or co-pilot's seat, and during the first part of the flight, Fred gave me a basic course on flying, on the cockpit instrumentation, etc.

7. After the plane landed in the Boston area — at Hanscom Field in Bedford, Massachusetts — Fred parked it near a terminal, and as we exited the plane, several men identifying themselves as agents of the Drug Enforcement Agency, or DEA, approached us with guns drawn and we were arrested. I was later charged with conspiracy to distribute, possession with intent to distribute and distribution of, marijuana which the authorities said was on the airplane.

8. The course of the criminal proceedings which followed, in the United States District Court for the District of Massachusetts, is shown on the docket sheet for the case of *United States* v. *George Panagiotou,* Criminal No. 76-0298-S, a copy of which is attached to this affidavit as Exhibit "A". On March 23, 1977, the government moved to dismiss the case against me on grounds that ". . . further prosecution would not be in the interests of justice", and all charges against me were dismissed. A copy of the dismissal of the indictment is attached to this affidavit as Exhibit "B."

9. I have never been involved with any criminal activity pertaining to drugs — or, indeed, with any criminal activity at all — and with the exception of the incident in question, have never been accused of criminality of any kind. I certainly have never been involved in "dealing" in drugs. My eagerness to spend time with an old friend and to enjoy a private flight to Boston at the end of my vacation caused me to be in the wrong place at the wrong time.

GTE's Access To Judge McNaught's Chambers

10. The trial took place in Judge McNaught's courtroom on the third floor of the United States Post Office and Courthouse in Boston. Judge McNaught's chambers are immediately adjacent to the courtroom, and they can be entered from the hallway outside the courtroom.

11. On more than one occasion during the trial, I observed Ann L. Palmieri — one of the lawyers with the trial team from the firm of Day, Berry & Howard representing the defendant, GTE Products Corporation ("GTE") — gain access to Judge NcNaught's chambers from the door in the hall outside his courtroom. On more than one occasion, I saw Ms. Palmieri enter the chambers alone, without any other counsel in the case with her. I also saw her, on more than one occasion, enter chambers with one of the in-house lawyers from GTE who also sat at counsel table during the trial. On those occasions, no other counsel in the case were with them.

12. On one occasion in particular, in late May or early June, at the beginning of the lunch recess, I observed Ms. Palmieri seeking access to Judge McNaught's chambers with a file folder of some kind in her hand. I was curious enough about the incident to wait in the hallway outside chambers to enable me to observe Ms. Palmieri when she left. I would estimate that it was approximately 15 to 20 minutes before Ms. Palmieri emerged from Judge McNaught's chambers, empty-handed; she no longer had the file folder in her possession.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this day of November, 1992.

s/ G. PANAGIOTOU

GEORGE PANAGIOTOU
Nov. 2nd, 1992

U.S. MAG. CASE NO. CR 76

PANAGIOTOU, GEORGE
MAY 3, 1976

U.S. TITLE/SECTION
21:841(a)(1)
21:846
18:2

OFFENSES CHARGED
Conspiracy to distribute ... possession with intent to distribute and distribution of a quantity of marihuana ...

OFFENSE (IN COMPLAINT)
Distribution of marihuana, 21 U.S.C. 846, 821(a)(1)

U.S. ATTORNEY OR ASST.
JAMES E. O'NEIL, ESQ.

ATTORNEYS
RICHARD A. GARGUILO, ESQ.
BRIAN J. McMINIMEN, ESQ.
One Court St., Boston, MA 02108

LEWIS-1, GOLIATSATOS-3

DATE	PROCEEDINGS
1976	
May 3	Memorandum issued, Princi, M. Re: Bail
May 4	Bail review hearing before Tauro, D.J. — bail reduced to $5,000. Deft. to telephone Atty. Krasnoo daily, Travel restricted to
May 4	Motion to Reduce Bail, filed.
May 27	Motion for Leave to Withdraw as Counsel, filed by Atty. James Krasnoo, GRANTED, PRINCI, M. 6/1/76

DATE	PROCEEDINGS
1976	
May 27	Govt's Mtn. in Opposition to Deft's Mtn. for Amendment of Condition of Bail, filed.
May 27	Deft's Statement in Response to Govt's Mtn. in Oppos. to Deft Mtn. for Amendment of Condition of Bail, filed.
May 27	Mtn. that Bail Restriction be Temporarily Amended, filed; DENIED without prejudice, Tauro, D.J. 5/27/76
May 27	Govt's Mtn. in Opposition to Deft's Mtn. for Amendment of Condition of Bail, filed.
June 8	Motion for Enlargement of the Conditions of Bail, ALLOWED, "N Affidavit to be filed indicating dates of travel", Tauro, d.j. 6/17/76; Affidavit in Support of Motion, filed.
July 8	Indictment returned.
July 14	Case referred to Magistrate Pierce for Arraignment.
July 19	PIERCE, M. Deft. before court with counsel for Arraignment; Plea of Not Guilty entered; Foster Warning issued; Govt. to provide automatic discovery forthwith; Deft. has ten days to file motions; Bail cont. at $5000. wos.
July 23	Deft.'s Motion for Midification of Conditions of Bail, filed. cs.
July 28	Motion for Copy of Statements, filed. c/s.
July 28	Motion for the Inspection of statements of Co-Defts., filed. c/s.
July 28	Motion to Suppress Evidence, filed. c/s.
July 28	Motion for Bill of Particulars, filed. c/s.
July 28	Motion to Sever, filed. c/s.
July 28	Motion for the Deft. to inspect Evidence, filed. c/s.
July 28	Motion for Oral Arguments, filed. c/s.

DATE	PROCEEDINGS	
1976		
Aug. 20	PIERCE M.	MAGISTRATE'S STATUS REPORT: 1.) Case is not ready for trial; Motions to suppress and to sever outstanding; 2.) Case is 180 day case; Time limit for trial is 164 days; Must be tried on or before 2-1-77. 3.) Total excludable time: 16 days.
Aug. 20	PIERCE, M.	ORDER ON EXCLUDABLE DELAYS AS DETERMINED BY MAGISTRATE, entered.
Oct. 12	SKINNER, J.	Case called for trial assignment; hearing on motions set for 11/22/76.
Nov. 22	SKINNER, J.	Case called for hearing on motions; Deft., Goliatsatos' Motion to Sever is Denied; Motion of Deft. Lewis to sever is Denied; Counsel for Deft., Panagiotou is on trial in state court and unable to appear; Hearing on motions to suppress is cont. to 12-28-76 at 9 a.m.
Dec. 28	SKINNER, J.	Hearing on defts.' Motions to suppress; Testimony; Evidence; Memo in support of Defts.' Motion to suppress filed; Arguments by counsel' Defts.' Motion to suppress is allowed as to the briefcase, and denied in all other respects. Order to enter. Deft., Panagiotou's motion to sever is Denied.

DATE	PROCEEDINGS
1977	
Jan. 11	SKINNER, J. ORDER ON THE DEFTS.' MOTION TO SUPPRESS EVIDENCE: "The motion to suppress evidence is otherwise DENIED." entered. cc/cl.
Jan. 20	Govt.'s Motion for Trial, filed. c/s.
Feb. 9	SKINNER, J. Case called for trial assignment; Trial scheduled for 3-21-77 at 9 a.m.
Mar. 16	Govt.'s Motion for continuance of trial date, filed. c/s.
Mar. 23	SKINNER, J. DISMISSAL OF INDICTMENT, entered. cc/cl.

AFFIDAVIT

EDWIN A. McCABE, on his oath, deposes and says as follows:

1. I was lead trial counsel of record for the plaintiff in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-Mc (the "Cool Light Case"), which was tried in May and June of 1990. I continued to act as counsel for Cool Light Company, Inc. ("Cool Light") throughout the retrial of portions of the case, in Civil Action No. 86-2668-K (following the retirement of McNaught, J., and the reassignment of the case to Keeton, J.), and in the United States Court of Appeals for the First Circuit, No. 92-1082. I am making this affidavit in support of Cool Light's motion seeking relief from judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

My Discovery Of Possible Grounds For Relief

2. I first became aware of the possibility that the trial — and result — of the Cool Light Case had been tainted by judicial partiality and impropriety on September 29, 1992, when I received an unsolicited telephone call at home from William Koerner, the foreman of the jury from the 1990 trial of the case.

3. Mr. Koerner had telephoned me at home on one prior occasion, on September 9, 1992; he identified himself to me and informed me that he was calling me at the request of George Panagiotou, the President of Cool Light. I explained to Mr. Koerner that we could not discuss the jury's deliberations, and we did not do so. During his first telephone conversation with me, Mr. Koerner expressed his concern that the jury's work for six weeks had been nullified by Judge NcNaught's grant of a new trial, and he shared with me the content of letters which he and Judge McNaught had exchanged — copies of which are attached to his affidavit — shortly after the new trial was ordered. In that first telephone

conversation, he said nothing of the comments apparently made by Judge NcNaught in his chambers just prior to sending the jurors home after their verdict had been rendered.

4. In our second, September 29, 1992, telephone conversation, Mr. Koerner told me that he had been troubled for more than two years by something that Judge NcNaught had said to the jury in chambers and he asked whether that was something which he could properly reveal. I responded that I had never been called upon to look into such an issue, that I could not give him a fully-informed answer to the question, but that I knew of no restrictions on his right to inform me about the Court's post-verdict comments to the jury. He then told me of those matters — the judge's total disagreement with the verdict and references to Mr. Panagiotou's involvement in drug dealing — which are the subject of his affidavit.

5. I was stunned by what Mr. Koerner told me; I responded only by saying that I had no idea what the implications of such comments by the Court might ultimately be, and our conversation shortly thereafter came to an end.

6. Within a matter of minutes, the telephone rang again and I found myself speaking to a second juror, Janet Livesey, who had apparently been prompted by Mr. Koerner to call me. She essentially confirmed what Mr. Koerner had told me about Judge McNaught's comments. She also added that she recalled that the judge had said something about an airplane and an airport as he described for the jury the incident involving Mr. Panagiotou and drug dealing about which he said he had information.

7. In the days and weeks that followed, I received unsolicited telephone calls from two more of the jurors — Ms. Fischer and Mr. Swift — in which each of them also confirmed what had happened in chambers. And when I sat down with Ms. Livesey to verify, in affidavit form, what she had told me, she reported on her telephone conversation with yet another juror — Christina Szoka-Rheaume — to the effect that the judge had said that the incident in question had occurred at Hanscom Field in Bedford, Massachusetts.

8. By the time I visited with Ms. Livesey about the preparation of her affidavit, I had learned most of the details of the so-called "drug dealing" incident to which Judge NcNaught obviously had reference in his comments to the jury. I knew that the arrest of Mr. Panagiotou and one other person had taken place at Hanscom Field.

9. I went to the United States District Court for the District of Massachusetts and, with some difficulty (the index cards were missing from the Court's card file), located the docket sheet on the 1976-1977 criminal prosecution against Mr. Panagiotou, a case which had been assigned to Judge Walter J. Skinner. I observed that there was no mention in that public record of Hanscom Field as the location where the arrest had been made, I then went to the Federal Records Center in Waltham and reviewed the official Court file on the case, a file sent there for storage in 1981. From various materials in the file, I was able to identiy Hanscom Field as the place where the arrest had been made as Mr. Panagiotou emerged from his friend's airplane.

Defendant's Counsel's *Ex Parte* Access To Judge McNaught's Chambers

10. I had observed Ann Palmieri, one of the young associate lawyers representing the defendant in the Cool Light Case and a former law clerk of Judge NcNaught, entering and leaving the judge's chambers unaccompanied by any counsel representing Cool Light. On more than one occasion, Ms. Palmieri was, however, accompanied by in-house counsel for the defendant, Martha A. Finnegan, Esq.

11. While I was unhappy about such comings-and-goings by one of defendant's counsel, I assumed that they did not involve any communication with Judge McNaught but rather with one or more of his law clerks. And while I was far from pleased with such fraternization — which I believed then and believe now gave the appearance of impropriety — I did not raise the matter with the Court at the time. I simply did not

believe that Judge McNaught, whom I had known for the better part of twenty years on the bench (both state and federal), would tolerate any improper communication or contact, either with him or his law clerks.

12. I did not learn until recently that on at least one occasion, Ms. Palmieri was seen entering chambers with a file in hand and leaving chambers empty-handed.

13. I have also learned, as recently as November 23, 1992, that Judge McNaught was overheard speaking with court personnel at some point during the trial of the Cool Light Case and saying something to the effect that if the jury were to return a verdict for the plaintiff in the case, he intended to "overrule" it.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 30th day of November, 1992.

s/ E. A. McCabe

Edwin A. McCabe

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668

COOL LIGHT COMPANY, INC.,
A CALIFORNIA CORPORATION;
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
A DELAWARE CORPORATION;
DEFENDANT.

TWENTY-FIFTH DAY OF CIVIL JURY TRIAL VERDICT

BEFORE THE HONORABLE JOHN J. MCNAUGHT
United States District Judge

Courtroom 12
U.S.P.O. & Courthouse
Boston, Mass.
Friday, June 29, 1990

APPEARANCES:

For the Plaintiff:
MCCABE & ASSOCIATES
EDWIN A. MCCABE, ESQ.
1111 Beacon Street
P.O. Box 3387
Boston, MA 02101

GASTON & SNOW
SYDELLE PITTAS, ESQ.,
and
RICHARD K. BERGER, ESQ.
One Federal Street
Boston, MA 02110

(Appearances continued.)

PATRICIA A. CASEY-PRICE
Official Court Reporter
327 USPO & Courthouse, Boston, MA 02109
(617) 482-9119

(10:30 a.m.)

THE COURT: We have a writing to the effect that they have reached a verdict.

After I read the answers to the questions on the general verdict, I'm going to send the jury back out in case there is any discussion that we have to have before we retire. Okay?

(Pause)

(Jury present in courtroom.)

THE CLERK: Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: Yes, we have.

(Verdict handed to the clerk, who hands it to the Court.)

THE COURT: Why don't you sit down for a moment because I have to read them.

(Pause)

THE COURT: I can see right off the bat that I have to give you another question.

(Pause)

THE COURT: I'm going to read these at any rate, and then I'm going to put the question to you. The question, you may be thinking, is whether or not within the amount of money that you have awarded on Count 6 for fraud, you included punitive damages. I'm going to have to ask how much of that

was for punitive damages, if anything. So you can be thinking of that question as we go along.

But I'm going to read these for the edification of the counsel and the parties.

Mary, do you mind if I take your job away from you in this regard?

THE CLERK: Not at all, Judge.

THE COURT: I'm going to ask you after each one whether or not I read answered the answer correctly, Mr. Foreman. Okay?

"Question No. 1, Did Cool Light, through Mr. Panagiotou, disclose a trade secret of Cool Light to GTE?"

Your answer was, "Yes."

Correct?

"Question No. 2, If your answer to Question No. 1 was 'Yes', what was the trade secret that was disclosed?"

And your answer was, Combination of existing technology through a unique manufacturing process to provide quality products that gave plaintiff a competitive advantage in that time frame in the STTV industry."

Correct?

"Question No. 3, Did defendant GTE, without permission, disclose Cool Light's trade secret to anyone else?"

Your answer is, "No."

Correct?

Question No. 4, then, requires no answer.

"Question No. 5, Did GTE use improper means to obtain a trade secret from Cool Light?"

Your answer is, "Yes."

Correct?

"Question No. 6, did GTE obtain confidential information from Mr. Panagiotou and then use it to advance its own business interests?"

Your answer is, "No."

Correct?

That means that Question No. 7 need not be answered.

"Question No. 8, Did Mr. Barkley pass along information to Mr. Panagiotou concerning coatings applied to reflectors by Liberty Mirror for Cool Light?"

The answer is, "Yes."

"Question No. 9, If your answer to Question No. 8 is 'Yes', did Mr. Barkley transmit information which was the property of Liberty Mirror?"

Your answer is, "Yes."

"Question No. 10, If answer to Questions No. 8 and No. 9 are 'Yes', did Mr. Barkley have the right to do so?"

Your answer is, "No."

Correct?

"Question No. 11, Did anyone at GTE make a false representation of fact to Mr. Panagiotou?"

Your answer is, "Yes."

"Question No. 12, If your answer to Question No. 11 is 'Yes', what was that representation?"

And your answer is that GTE had the ability to produce in volume a quality product of dichroic coated reflectors for the specifications disclosed by Cool Light Inc.?

Did I read it corrrectly?

"Question No. 13, if you find GTE made a false representation, did Mr. Panagiotou rely on it, to his damage?"

Your answer is, "Yes."

"Question No. 14, If Cool Light lost potential profits as a result of GTE's conduct, what was the amount of lost profits?"

Your answer is, "$9,300,000."

Did I read your answer correctly?

"Question No. 15, If GTE made a profit of its own by reason of wrongful conduct toward Cool Light, what was the amount of that profit?"

Your answer is, "None."

"Question No. 16, was there an agreement made by GTE with Cool Light?"

Your answer is, "Yes."

"Question No. 17, If your answer to Question No. 16 is 'Yes', was the agreement in writing?"

Your answer is, "Yes."

"Was there an agreement, oral?"

Your answer is, "Yes."

And you signed it, Mr. Foreman, on June 29, 1990.

Did I read those correctly?

THE FOREMAN: Yes.

THE COURT: Now, for your general verdict slips. On the counterclaim by GTE against Cool Light, you find in favor of Cool Light.

Do I recite that correctly?

Hold on for just a minute.

(Pause)

THE COURT: On Count No. 1 for misappropriation of a trade secret at common law, you find for the defendant.

Correct?

On Count No. 4, for taking of a trade secret, under General Laws, Chapter 93, Section 42, you find for the defendant.

Correct?

On Count No. 5, for misappropriation of information, you found for the defendant.

Correct?

On Count No. 6, for fraud, you assess damages in the — you find for the plaintiff and assess damages in the amount of nine million four hundred thousand — four hundred-fifty thousand dollars, I'm sorry.

I think I know what the answer is going to be to the question that I put to you. But I'm going to put it to you and ask you to respond to it in writing, anyway.

Count No. 11, for contract, you found for the plaintiff and assessed damages in the sum of three million six hundred thousand — six hundred ninety-four thousand dollars.

Did I read that correctly?

On Count 12, for breach of implied obligation of good faith, you found for the plaintiff and assess the damages in the sum of $2,800,000.

Did I read that correctly?

I will ask each member of the jury now, before I send you back in to the deliberation room, whether you agreed to these questions and these verdicts prior to coming into the courtroom. I will ask each juror by number. And if you will simply respond yes, if you agreed, no, if you never did agree to it, I would appreciate it.

Juror No. 1?

THE JUROR: Yes.

THE COURT: Juror 2?

THE JUROR: Yes.

THE COURT: Juror No. 3?

THE JUROR: Yes.

THE COURT: Juror No. 4?

THE JUROR: Yes.

THE COURT: Juror No. 5?

THE JUROR: Yes.

THE COURT: Juror No. 6?

THE JUROR: Yes.

THE COURT: Juror No. 7?

THE JUROR: Yes.

THE COURT: Juror No. 8?

THE JUROR: Yes.

THE COURT: Juror No. 9?

THE JUROR: Yes.

THE COURT: Juror No. 10?

THE JUROR: Yes.

THE COURT: I thank you very much. I would ask you if you would kindly retire, I have to discuss matters with the attorneys. And it's my intention to ask you whether, in the sum that you granted on Count 6, you included punitive damages. And if so, to what amount. Okay?

Thank very much. Would you retire?

(The Jury exits the courtroom.)

THE COURT: Please be seated.

QUESTIONS TO BE ANSWERED BY THE JURY

1. Did Cool Light, through Mr. Panagiotou, disclose a trade secret of Cool Light to GTE?

Yes X No _____

2. If your answer to Question No. 1 was "Yes", what was the trade secret that was disclosed?

Combination of existing technology, through a unique manufacturing process to provide quality products that gave plaintiff a competitive advantage in that time frame, in the STTV industry.

3. Did the defendant GTE, without permission, disclose Cool Light's trade secret to anyone else?

Yes _____ No X

4. If your answer to Question No. 3 is "Yes", to whom was it disclosed without permission?

---

5. Did GTE use improper means to obtain a trade secret from Cool Light?

Yes X No _____

6. Did GTE obtain confidential information from Mr. Panagiotou and then use it to advance its own business interests?

Yes _____ No X

7. If your answer to Question No. 6 is "Yes", what was the confidential information?

---

8. Did Mr. Barkley pass along information to Mr. Panagiotou concerning coatings applied to reflectors by Liberty Mirror for Cool Light?

Yes X No _____

9. If your answer to Question No. 8 is "Yes", did Mr. Barkley transmit information which was the property of Liberty Mirror?

Yes X No _____

10. If your answer to Questions Nos. 8 and 9 are "Yes", did Mr. Barkley have the right to do so?

Yes _____ No X

11. Did anyone at GTE make a false representation of fact to Mr. Panagiotou?

Yes X No _____

12. If your answer to Question No. 11 is "Yes", what was that representation?

That GTE had the ability to produce, in volume, a quality product of dichroic coated reflectors per the specifications disclosed by Cool Light Inc.

13. If you find GTE made a false representation, did Mr. Panagiotou rely on it, to his damage?

Yes X No _____

14. If Cool Light lost potential profits as a result of GTE's conduct, what was the amount of lost profits?

Nine million three hundred thousand dollars ($9,300,000)

15. If GTE made a profit of its own by reason of wrongful conduct toward Cool Light, what was the amount of that profit?

None

16. Was there an agreement made by GTE with Cool Light?

Yes X No _____

17. If your answer to Question No. 16 is "Yes", was the agreement

In writing? Yes X No _____

Oral? Yes X No _____

Date: June 29, 1990

WILLIAM W. KOERNER
Foreperson

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.,

v.

GTE PRODUCTS CORP.

VERDICT

COUNT ONE: COMMON LAW-MISAPPROPRIATION OF A TRADE SECRET

WE, THE JURY, FIND for the defendant.

WILLIAM W. KOERNER
Foreperson's Signature

Date: June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.,

v.

GTE PRODUCTS CORP.

VERDICT

COUNT FOUR: MASS. GEN. L. c. 93, Sec. 42 — "TAKING OF A TRADE SECRET"

WE, THE JURY, FIND for the defendant.

WILLIAM W. KOERNER — Date: June 29, 1990

Foreperson's Signature

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.,

v.

GTE PRODUCTS CORP.

VERDICT

COUNT FIVE: MISAPPROPRIATION OF INFORMATION

WE, THE JURY, FIND for the defendant.

WILLIAM W. KOERNER
Foreperson's Signature

Date: June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.,

v.

GTE PRODUCTS CORP.

VERDICT

COUNT SIX: FRAUD

WE, THE JURY, FIND: for the plaintiff, and assess damages in the sum of nine million four hundred fifty thousand dollars ($9,450,000.00).

WILLIAM W. KOERNER
Foreperson's Signature

Date: June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.,

v.

GTE PRODUCTS CORP.

VERDICT

COUNT ELEVEN: CONTRACT

WE, THE JURY, FIND: for the plaintiff, and assess damages in the sum of three million six hundred ninety four thousand dollars ($3,694,000.00).

WILLIAM W. KOERNER
Foreperson's Signature

Date: June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

COOL LIGHT CO., INC.,

v.

GTE PRODUCTS CORP.

VERDICT

COUNT TWELVE: BREACH OF IMPLIED OBLIGATION OF GOOD FAITH

WE, THE JURY, FIND: for the plaintiff, and assess damages in the sum of two million eight hundred thousand dollars ($2,800,000.00).

WILLIAM W. KOERNER
Foreperson's Signature

Date: June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Case Number:
CA 86-2668-Mc

GTE PRODUCTS CORP.,

v.

COOL LIGHT CO. INC.

VERDICT

WE, THE JURY, FIND for the defendant COOL LIGHT CO., INC.

WILLIAM W. KOERNER
Foreperson's Signature

Date: June 29, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY, INC.,

v.

GTE PRODUCTS CORPORATION

HEARING

BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	EDWIN A. MCCABE, ESQ.
For the Defendant:	STEPHAN MOULTON, ESQ. NANCY GANS, ESQ. OWEN TODD, ESQ. ALLAN VAN GESTEL, ESQ. PATRICIA RUSSOTTO, ESQ.
Court Reporter:	TERI C. GIBSON, CSR COURT REPORTER P.O. Box 47 DORCHESTER, MA 02121 (617) 442-0352

Proceedings recorded by mechanical stenography; computer aided transcription.

PROCEEDINGS

THE CLERK: Civil Action 86-2668, Cool Light versus GTE Products Corporation.

THE COURT: Good afternoon.

ALL PARTIES: Good afternoon.

THE COURT: I am aware that there are a large number of motions before me, that I have only partly had an opportunity to even read, first reading but want to advise you the request for immediate hearing, it seemed to me necessarily I can't allow it.

Now, it also occurs to me there is a matter that I should address up front before I start thinking about anything else. Of course Judge McNaught and I were colleagues on this court for 13 plus years. We were colleagues in teaching advocacy in various programs, law school programs, and M. C. L. E. programs over a lot of years before that.

If anybody thinks there is any reason for my recusing myself from this matter, we better address that up front first before we get to anything else. I suppose that if there is, it would probably affect to some degree maybe not to quite the same degree, every other one of my colleagues on this court, and if there should be a determination of accusal, what would happen would be we do have to get a designation of somebody in — out of the district to hear these matters.

Now, I don't — I haven't undertaken to make any assessment in judgment of that question at all, but I think that's a question we should all address up front. I recall that some six or eight years ago, I had a different kind of question about whether I should recuse myself in a case that raised questions about balance billing as influenced by Medicare and so forth.

And the issue came up, well, are judges who are over 65 or 62 or whatever the age would be, disqualified or are judges who are under that whose parents are over that age disqualified, or should everybody be disqualified, maybe the younger more disqualified than the older.

And I raised the question with counsel again saying, "We better address this before we get into anything else," and indeed, counsel for one of the parties under-took to persuade me that I should recuse myself, so I took briefs on that before I did anything else. Came to the conclusion that if I should recuse myself, every other judge in the United States should likewise recuse himself or herself, and that in that circumstance, there was a principle of necessity. So I do not recuse myself, and I can't remember what happened, whether it was appealed or — and I was affirmed or whether nobody appealed. Anyway I decided the case.

Now, I suppose this is — I recall another circumstance in which I recused myself because a complaint was made against every justice, every justice of the supreme judicial court, most of whom I knew personally and several people who were present and former members of the Board of Bar of Overseers against whom all allegations were made, and it would appear that I would have to at least preside over a trial in which their credibility was potentially at issue or make rulings on motions where their credibility was openly at issue.

And I came to the conclusion I should recuse myself and suggested to the chief judge that I saw that probably every one of my colleagues would come to the same conclusion, and the chief judge agreed and made arrangements through appropriate channels for the designation of a visiting judge to hear that matter.

So there are in — circumstances in which the grounds of recusal, if they are thought to be grounds of recusal, would not apply uniformally to all United States district judges around the country. That we could make appropriate arrangements, and that if I am to do something of that kind, you should probably at least issue a stay of all proceedings until those issues are heard.

Now, I think in — the first question for me to put to all of you, have you considered this question whether I should recuse myself from hearing these matters before me, and are you ready to address that question?

MR. VAN GESTEL: Your Honor, I am Allan Van Gestel. As you will recall, I am counsel for GTE, the defendant in this case, and I would very much urge you not to recuse yourself, because you are uniquely positioned, not because of your sitting on this bench as a colleague of Judge McNaught's, because you were the trial judge in the second trial of this case, and therefore, you are uniquely positioned to understand better than any other judge in the country what this case is all about. So I would urge you to stay on.

Thank you.

MR. TODD: Your Honor, Owen Todd. I appear not for a party but for a prospective deponent, Ann Palmari, and I would echo Mr. Van Gestel's remark, and signify for the record that, no objection on the part of my client.

MR. MOULTON: And it would be equally so with respect to Charles Donelan, who I represent. I am Stephan Moulton, and I adopt the arguments of my two colleagues.

MS. RUSSOTTO: I am Pat Russotto. I am with the Department of Justice. We are here on behalf of McNaught, Leslie Betel, and MaryLou Moran. We also would have no objection to your staying on.

MR. McCABE: Yes, I have considered the matter, your Honor. Edwin McCabe on behalf of the plaintiff.

I would urge that for purposes of the present motions, there is certainly no problem, and I would urge your Honor not to recuse yourself.

I think that we are in some difficult waters, obviously with the subject matter of this motion ultimately in terms of the type of relief that has been requested and so forth, I raise that not because of any personal connections that you may have with Judge McNaught.

I think that that probably would affect all counsel involved in the room with the possible exception of the justice department from Washington having had a personal relationship with Justice McNaught.

Myself, I raise it only because I would not want my silence in that regard to be misconstrued at a later time if we get a — a question of review of the evidence underlining the jury verdict giving the fact that you have been involved in a retrial of part of this action. I don't think that's a matter for recusal quite frankly, but it might be a matter where we would want to be able to discuss its appropriateness of some further review by you of the underlining evidence. But certainly for present purposes, in absolute, my problem and indeed, I would join with my colleagues in urging you not to recuse yourself.

MR. VAN GESTEL: Your Honor, may I be heard briefly in reresponse to McCabe?

THE COURT: You may.

MR. VAN GESTEL: I think the time has come for Mr. McCabe and his client to step a — go forward. I don't think we ought to start yet down another road where maybe somewhere along the line, a year, his client is going to say you ought to step out. We ought to know here, right here before we go any further.

THE COURT: Well, I think there might be a point there. Also, Mr. McCabe, I am not sure you understood what you were saying to me.

Now, one very well subtle principle is that what a judge learns about a matter as a result of preceding over it is not grounds for recusal of that judge in preceding over further proceedings in that matter; that is, the views about the case that the judge may have developed judicially in the performance of the judicial functions are not the basis for recusal.

The basis for recusal has to be something from outside that as distinguished from something that comes to the judge right here in the courtroom or through the filings. It sounded to me as if you were saying that there might be a point at which because of my familiarity with the case, you would be asking me to recuse myself.

MR. McCABE: No. If it sounded that way, your Honor, then I was misunderstood, or did not speak clearly. What I

am talking about as I said, it's not a matter of recusal I don't believe at any point.

What I am talking about is that what we have sought in the way of relief in terms of the underlining motion that has been filed with the court, is a de novo review of the quantum of evidence that was present for purposes of the jury's verdict, and my point simply was that you have heard the retrial of portions that were tried to the jury and have formulated your own opinions and articulated those.

THE COURT: All right. Now, that is not a matter of recusal what you are stating now. So what I think, Mr. Van Gestel, the point that you were making is met, that is, there may be questions to be decided along the way about what is the scope of this preceding. They will not be matters concerned with recusal but matters concerned with what is the scope of — the appropriate scope preceding whoever the judge may be that is hearing it.

So now I will say to you that I suppose it would be my duty to recuse myself anyway if I thought there grounds to do it, even though all counsel are willing to say that they are not asking me to do so, but I'm not aware of any reason I should do so, because I think as far as I know now, the issues that are being raised are not issues that would in any way involve my deciding something on the basis of information that came to me outside my performance of judicial duties, and I have long since taken the position that I should not be recusing myself because I know one lawyer better than another or because of bench bar relationships in general.

And it seems to me that the same thing applies here. So given the fact that no counsel is urging a ground of recusal, and I do not see one myself, I will proceed to allow the case to remain before me as it has come to me through the routine of the draw, and we will proceed to consider other issues.

Now, I am aware that there are several motions to quash, raising some overlapping issues but also some distinctive issues among them. I am aware that there are a fair number of filings with some memoranda among them. I would not think

of trying to decide the issue this afternoon on this short notice, and so it seems to me in those circumstances that it — the appropriate thing for me to do is to issue a stay until further ordered by me, and then confer with you about whether you have submitted to me everything you want to submit, and if not, how we go about scheduling whatever additional is to be submitted and whatever oral argument.

I suspect that this is a matter in which I may want to consider oral argument, although I don't as a routine as I think all of you know. As a routine, I do not schedule oral arguments on matters that are basically legal questions that are submitted through briefs, and ordinarily, I take the briefs first to see if it seems to me oral argument would be useful, and if instead I conclude that the matter is fully submitted on the briefs and the briefs have really met, and they are not issues I want to ask you about, that either are not exactly addressed in the briefs or on which I think one brief is not responding to the other, I would not have oral arguments. I suppose I would suggest that's the way we should start.

Now, let me ask then, I am aware of a number of things that have just been filed today. Mr. McCabe —

MR. McCABE: Yes, sir.

THE COURT: — you have in your memoranda submitted to me all of the relevant arguments and presidents and statutes and rules that you think I should consider?

MR. McCABE: No, your Honor, I have not, simply because I have not filed anything with the clerk yet on the subject of whether the discovery should go forward. These were motions that were served upon me starting this morning, and so I would like to have a very brief opportunity to put together a memorandum on them, those various points.

THE COURT: I think I should allow you that, of course I should also stay all proceedings, other than the proceedings related to my rulings until I have made those rulings. Do you have any problem with that?

MR. McCABE: Only that obviously we have subpoenas out. If we have agreement generally that if the court rules that

these depositions should go forward, the subpoenas would be honored without the necessity for further service, why that's fine. Obviously we have —

THE COURT: Do anybody have a problem with that understanding?

MR. VAN GESTEL: None whatsoever. I had already told Mr. McCabe, perhaps he forgot, that those subpoenas were necessary for me or my client.

MR. McCABE: That is true.

THE COURT: All right. Then I will order a stay of all proceedings, except such as I authorized by my further rulings this afternoon until I have made a decision on the various motions to quash, or I think they are all framed in terms of the motion to quash as I understand it now, but anyway, motions designed to foreclose the further discovery.

Now, next, I think you are all aware that I am going to rather substantial efforts to try to comply with federal rules of civil procedure when just, speedy, and inexpensive disposition of every matter before me, and so I want to do my best to come to some understandings and rulings if necessary this afternoon, that result in chopping down as few trees for filings as possible and moving that matter as quickly as possible to making it ready for my consideration.

Now, I think my suggestion would be, but I invite your comments as to whether you see a better way of proceeding, that if I have all of the motions before me now, that are likely to be filed on this matter until I make some rulings, that what I do is schedule a date for simultaneous submissions of everybody, of anything further you want to submit with a second date thereafter of simultaneous responses so that we don't have a succession of papers with life, request on for leave to file responses and who knows when, then it becomes ready for my consolidation. Dosen't that make sense to have a date for simultaneous submission and date for simultaneous responses?

MR. VAN GESTEL: Your Honor, may I inquire, there really are two motions or two sets of motions before you if you will. There is the underlying motion under rule 60(b)6,

what I would call a motion on the merits if you will, and then there are the motions by the various people who have received deposition notices or subpoenas. Unlike the situation where a complaint or notice of proceedings, rules and whatnot have come into play, have just been filed, and a party gets an opportunity to discover whether they in fact have a case, we are in a much different circumstance here.

And I really think what we, if I may respectfully, what you ought to be addressing as much if not more than the discovery request is the underlining motion itself, because it is the strongly held belief, I think of everybody in this side of the room at least, that discovery is not even needed and indeed would be inappropriate to do — to work on the underlining motion. Therefore, for you to get off on a tangent if you will, if I may say, that way of dealing with discovery first, and then getting to the underlining motion, may not be the right way to follow, right course to follow.

THE COURT: Let me consider that for a moment. Mr. McCabe, as I understand some, at least of the responses to submissions, there is in effect a motion to dismiss or strike your motion for several reasons, one of which is that neither this court nor any other court has jurisdiction to hear this matter, because of the delay between the time of the events and the time of the motion. Have I correctly understood that you are making such an argument?

MR. VAN GESTEL: That, your Honor, is one of many, I think.

THE COURT: I understand. I am just taking that as an example.

Now, if that motion is valid, everything else becomes moot. Does it make sense for me, either simultaneously or before scheduling the submissions on the motions, to quash with respect to discovery, to hear any contention, and get simultaneous filings on any contention, that there should be no hearing for whatever reasons, and no hearing and no discovery in preparation for a hearing?

MR. McCABE: Obviously, it's within the Court's sound

discretion to approach it that way. I guess my concern there would be that we would have such a fragmental approach to the matter that because, for example, on the affidavits that are presently before the Court on the underlying motion, the first information received from the foreman of the jury in the case was on September 29 of this year.

THE COURT: Well, you see that one raises some problems. We have a first circuit rule that there shall be no contact as I understand it, the rule, between counselor, between parties and a jury after verdict without the permission of the trial judge; isn't that correct?

Isn't that what the First Circuit ruled by precedents? Is it not in the first circuit local rules. Isn't that — am I not correct in remembering that body of decisions as saying that neither a party, nor any of the party's attorneys shall have any communication with a juror after a trial without the permission of the trial judge?

MR. McCABE: The case that I believe you, the Court has in mind is United States versus Cappios.

THE COURT: That's one of several.

MR. McCABE: Yes, one of several.

The circumstances here, your honor, were that I was convalescing from throat surgery and lying in bed when the phone rang, and it was a juror simply calling me.

THE COURT: I understand.

MR. McCABE: I instantly, and the affidavit points this out, advised him of the matters that we could not discuss. There was no interview. What the juror told me is all a matter of affidavit.

THE COURT: But wait a minute. When I let a jury go these days, I tell them, one thing I have to tell you is — that I tell them, "Now I withdraw all my instructions about you talking with anybody about this case. You are free to talk as much or little as you wish, but I have to tell you two or three more things; one of those is that the lawyers and parties in this case are forbidden to have any discussion with you without my persmission. That'a a rule of the First Circuit.

That being so, I am telling you to avoid any embarrassment. If you speak to one of the attorneys, they will — they have to tell you, 'I am not permitted to talk to you.' I am telling you that to avoid embarrassment." That's what I do, and I thought I was doing it consistently with the first cuircuit precedents.

Now, of course I am willing to hear your submissions on this subject, but that's an illustration of a matter that seems to me has to come very early because if indeed that is what the First Circuit has said, and I must follow it, then I think it probably falls from that that I have to disregard, cannot use in the judicial process, the product of a communication that occurred without my permission.

MR. McCABE: Well, certainly I would disagree with the last proposition entirely, but the only answer that I can give you is that is not what Judge McNaught told this jury at the time on the record.

What Judge McNaught told this jury was that there is a preclusion in the First Circuit from the lawyers contacting the jurors, but there is nothing that prevents the jurors from contacting the lawyers. I am quoting that almost verbatim. I would be happy to show you in the transcript.

THE COURT: You see, there I have still a further problem, I — of course if that's in the records, that's relevant to argue to me in this matter, but there is a second problem. If the First Circuit says that's wrong, then what do I do? You see I know it might be that members of the bar of this court are bound to follow the First Circuit even if a trial judge makes a mistake in telling them otherwise.

MR. VAN GESTEL: Your Honor, I can't help but point out to you that in the pleadings filed by Mr. McCabe himself, the affidavit of the foreman of the jury, I don't know who prepared the affidavit, but it came with his pleadings, and a — it looks like its on his print, it says on September 9, 1992, I, this is the juror, received a telephone call from Mr. Pangioto (ph.) and he asked me to contact Mr. McCabe. So we are right into it.

THE COURT: All right. My point at this point is I don't say how I can rule on the motions to quash without also considering of one grounds that are arguing to me for motion to quash that there isn't any appropriate preceding to support discovery. This court is not opened to authorized discovery *units* process there is some proceeding within the jurisdiction of court going on. I take this that's pretty clearly so.

MR. McCABE: I would say that's so.

THE COURT: So it seems to me then that I will need to modify my earlier suggestion, and I put to you then the question, should we limit your first submissions to the alleged grounds for not having any preceding, and then wait to have the submissions that would follow from that if I rule that there is an appropriate ground for a preceding, then what is the scope every appropriate discovery would come as the next question. It might make more sense for us to gather quicker, cleaner focus to focus on just the first questions. Is that appropriate proceed on going over which this court has jurisdiction and leave the subsidiary questions to be resolved by another proceeding to follow quickly after that if that one does not — if that one leaves something of a preceding before me. Dosen't that make sense?

MR. McCABE: Certainly.

THE COURT: All right. So that's what we will do then. It may be helpful for you to confer with each other about exactly what issues are raised by the motions. I even wonder now in light of that if it might make sense to have another way of proceeding, that first the movements that are seeking to have they dismiss (TR-BG)tor whatever you want form am relief you order it in other words terminate the proceeding file your submissions within a designated period of time, plaintiff respond, and then response to that but —

MR. VAN GESTEL: Your Honor, that has already happened.

THE COURT: It happened already?

MR. VAN GESTEL: The original motion was supported by a brief or a memorandum, and I yesterday, within the 14

days, filed an oppposition. So that it seems to me our principle positions are already before you. It may be that we each want to do a simultaneous response but the main briefing is done, I think.

THE COURT: Well, if that's true, then I think our original plan simultaneous first filings after today, and then simultaneous responses to that makes sense. So how much time did you want for that until that first filing.

MR. VAN GESTEL: I don't need a lot of time, but I'm sensitive to the time of year, your Honor, and I don't know what plans you may have.

THE COURT: Maybe I should be asking your associates instead of you.

(Laughter.)

MR. VAN GESTEL: Your Honor, I certainly could respond because I did respond just yesterday in any event, but I could respond further to some of the issues that you have raised here today by a week from today.

THE COURT: I suppose we are talking about a time limit on both sides, and is that enough for you, or do you want more for that before that first.

MR. McCABE: Given the fact you just freed up my schedule for the next few days. I think that would be enough for me. I am a little unclear on the procedure that is being suggested at this point.

Mr. Van Gestel and I as the parties in the case have now exchanged. I have filed my motion. He has filed a response. I am not sure what Mr. Van Gestel has in mind to file. I know I would like an opportunity to reply to what he has filed insofar as there are no underlining motions.

THE COURT: Obviously, I am going give you that. Let me describe what I would suggest and then invite your comments. That everybody who wishes to file anything more than you've already filed, and you are not required to refile something that's already before me in the memoranda. Everybody who wishes to file anything more that bears on the issues as

to whether there is a preceding to go forward here, should file it by 3:00 p.m., Tuesday, December 22.

And then everybody which — who wants to file anything that responds to those filings of December 22, again dosen't need to file, refile something I already said but if you — there are things in the December 22nd filings by opposing parties that you want to respond to, that should be filed, and now without threatening the vacations of the associates in your respective firms, I will take the liberty of suggesting that that should be done by, let's say Thursday, January 7, 1993, at 3 p.m., and at that point, I will take the matter under advisement.

If you wish to ask for oral argument, you may indicate that in your sibmissions. I am not promising I would allow it. I will want to look at the total set of the submissions and consider whether I will need oral argument, find it useful in deciding the matter, and then I would as soon as I can, after January 7 either decide it or schedule it for oral argument after I had time to look at it.

Is that acceptable to everybody?

MR. VAN GESTEL: That is acceptable.

MR. McCABE: It is, your Honor.

THE COURT: All right. Is there anything else we can usefully do today?

MR. VAN GESTEL: I think not.

THE COURT: All right. Thank you.

The court will be in recess.

THE CLERK: All rise for the court.

(Recess.)

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REPORTER's CERTIFICATE

I, TERI CELESTE GIBSON, Certified Shorthand Reporter, do hereby certify that the foregoing pages 1 through 22, are a true and accurate transcription of my stenographic notes taken in the hearing of Cool Light Company, Inc. Vs. GTE Products Corporation, Case No. 86-2668-K, taken before

Judge Robert Keeton, on December 15, 1992, in Boston, Massachusetts, prepared to the best of my knowledge, skill, and ability at the time and place aforementioned.

s/TERI CELESTE GIBSON

TERI CELESTE GIBSON, CSR,
Court Reporter

DATED: January 4, 1992

This certificate only applies to transcripts produced, copied, and signed by Teri Celeste Gibson, Court Reporter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY, INC.,
PLAINTIFF,
v.
GTE PRODUCTS CORPORATION,
DEFENDANT.

PLAINTIFF'S MOTION SEEKING PERMISSION TO INTERVIEW JURORS

The plaintiff in the above-captioned action, Cool Light Company, Inc. ("Cool Light") hereby moves for leave, under such conditions and subject to such restrictions as the Court shall deem proper, to interview six of the ten jurors who served on the jury at the trial of this action in May and June, 1990.

Cool light seeks such leave because four of the members of that jury have signed affidavits to the effect that Judge John J. McNaught — the District Judge who presided at the trial — made statements to them indicating possible judicial bias against George Panagiotou, Cool Light's principal, and prejudice or a lack of impartiality based upon information outside the record of the proceedings in the case. The affidavits have been submitted to the Court in support of a motion by Cool Light seeking relief pursuant to Fed. R. Civ. P. 60(b)(6).

The interviews sought by this motion would not inquire into any aspect of the jurors' deliberations in this case, but would rather be conducted for the purpose of learning whether the other members of the jury heard the statements made by McNaught, J., whether they can offer further detail with respect to any such statements made, and whether, in their

minds, the statements made gave the appearance of judicial bias, prejudice or a lack of impartiality.

Request For Oral Argument

A hearing with respect to this motion is requested pursuant to Rule 7.1(D) of the Local Rules of this Court.

Certification Of Conference Of Counsel

Plaintiff's counsel, Edwin A. McCabe, certifies pursuant to Rule 7.1(A)(2) of the Local Rules of this Court that he conferred with Allan van Gestel, Esq., defendant's counsel, at a meeting on November 30, 1992, and that they attempted in good faith — but without success — to resolve the issues presented by plaintiff's motion under Rule 60(b)(6). The relief sought by this motion was within the interim relief sought by that motion.

Cool Light Company, Inc.
by its attorneys,

s/E.A. McCabe

Edwin A. Mccabe
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Twenty-Five First Street
Cambridge, MA 02141-1810
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DATED: December 22, 1992

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above document was served in hand on the 22nd day of December, 1992, on counsel of record for the defendant.

s/ E.A. McCabe

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 86-2668-K

COOL LIGHT COMPANY,
PLAINTIFF,

v.

GTE PRODUCTS CORPORATION,
DEFENDANT.

PLAINTIFF'S MOTION FOR APPOINTMENT OF A MAGISTRATE JUDGE AS SPECIAL MASTER

The plaintiff in the above-captioned action, Cool Light Company, Inc. (Cool Light) hereby moves, pursuant to Rule 53, Fed. R. Civ. P., for the appointment of a Magistrate Judge of this Court, in accordance with 28 U.S.C., §636(b)(2), to conduct an evidentiary hearing with respect to the following matters:

(a) All of the facts and circumstances concerning certain communications between and among Cool Light's counsel and the four jurors whose affidavits have been submitted to the Court in support of Cool Light's Rule 60(b)(6) motion;

(b) All of the facts and circumstances concerning a certain communication between a person purporting to be a juror at the 1990 trial of this action and Allen van Gestel, Esq., counsel to the defendant, GTE Products Corporation ("GTE");

(c) All of the facts and circumstances concerning any investigation(s) by GTE of George Panagiotou, Cool Light's principal; and

(d) All of the facts and circumstances concerning the possession by any of GTE's present or former counsel of

the results of any such investigation(s) and the communication of any part of such results to Judge John McNaught or any person acting as a clerk to him.

The grounds for this motion are as follows:

1. GTE contends in the strongest and starkest terms — in its Further Supplemental Memorandum On Matters Relating to the Plaintiff's Rule 60(b)(6) Motion — that Cool Light's counsel has been guilty of ethical impropriety in his communication with the four jurors whose affidavits are on file with the Court. After listing a number of rhetorical questions and suggesting that the answers to them would somehow establish such impropriety, GTE adds: "At best the matter begs for investigation by some appropriate body." Cool Light agrees, and its counsel would welcome just such an investigation.[1]

2. Cool Light seeks by this motion to have such an investigation expanded to include the conduct of *all* parties and their respective counsel.

3. Cool Light's motion for post-judgment relief is one brought pursuant to Rule 60(b)(6), not one brought pursuant to Rule 60(b)(3) (alleging adversarial misconduct). However, Cool Light has sought to discover the source of certain prejudicial information about its principal, George Panagiotou, which the Court (McNaught, J.) apparently obtained or possessed during the trial of this action. More specifically, Cool Light has sought to discover whether GTE or its counsel communicated any such information—which it may have gleaned from one or more of the investigations it ordered into the personal life of George Panagiotou, Cool Light's principal[2] —

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[1] The answers to GTE's extensive list of rhetorical questions will prove to be a disappointment to GTE. For example, GTE surely recognizes that Lawrence Sager is an attorney who appeared on Cool Light's brief in support of its petition for rehearing and rehearing *en banc* in the First Circuit Court of Appeals; from his address GTE might have concluded that he is a professor of law at New York University Law School. Indeed, most of GTE's questions find ready answers in the affidavits already on file with the Court.

[2] The existence of at least one such report is acknowledged by GTE. Further Supplemental Memorandum, p. 19, n. 11.

directly or indirectly (through law clerks or other Court personnel) to Judge NcNaught.

4. GTE and its present and former counsel are attempting to block Cool Light's discovery, citing attorneys' work product and the attorney-client privilege as their principal bases for doing so. Indeed, in a Reply Memorandum filed with the Court on January 7, 1993 on behalf of Charles Donelan, Esq.—GTE's lead counsel at the 1990 trial—no doubt is left as to the reason for Mr. Donelan's staunch resistance to discovery: "...Cool Light threatens to depose Donelan with regard to 'information of any kind about George Panagiotou and drug dealing.' ...This type of broad interrogation poses a substantial danger of invading confidential attorney-client communications."

5. The appointment of a Magistrate Judge to conduct an evidentiary hearing would provide an efficient, time-effective means for obtaining rulings—after *in camera* review of all pertinent documents by the hearing officer—on all such claims of attorney-client privilege and work product protection.

6. The appointment of such a special master would also allow for a prompt resolution of claims of ethical impropriety which otherwise hang unfairly and indefinitely over the heads of all counsel involved, and, if impropriety of any sort is found, would assure a timely, detailed report of the same, supported by documents and sworn testimony, to the Board of Bar Overseers of the Commonwealth of Massachusetts and any other regulatory or supervisory bodies with a valid interest in such matters.

Conclusion

For all of the foregoing reasons, the Court is requested to order the appointment of a Magistrate Judge to conduct an evidentiary hearing with respect to the matters set forth in paragraphs(a) through (d) of this motion.

Request For Oral Argument

A hearing with respect to this motion is requested pursuant to Rule 7.1(D) of the Local Rules of this Court.

Certification Of Conference Of Counsel

Plaintiff's counsel, Edwin A. McCabe, certifies pursuant to Rule 7.1(A)(2) of the Local Rules of this Court that he conferred with Allan van Gestel, Esq., defendant's counsel, after sending him a copy of this motion on January 27, 1993, and that they attempted in good faith — but without success — to resolve or narrow the issues presented by this motion.

Cool Light Company, Inc.
by its attorneys,

s/E.A. McCabe
Edwin A. McCabe BBO #327040
Karen Chinn Lyons BBO #551832
Joseph P. Davis II BB0 #551111
The McCabe Group
Twenty-Five First Street
Cambridge, MA 02141-1810
(617) 494-1110

DATED: January 28, 1993

CERTICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above document was served in hand on the 28th day of January, 1993, on counsel of record for the defendant.

s/E.A. McCabe

SUPPLEMENTARY AFFIDAVIT

GEORGE PANAGIOTOU, having been duly sworn, deposes and says as follows:

Introduction

1. I am, and have been since the incorporation of the company, the President of Cool Light Company, Inc. ("Cool Light"), the plaintiff in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation,* Civil Action No. 86-2668-Mc, which was tried in May and June, 1990. I am making this affidavit in response to a Memorandum and Order of the Court dated June 7, 1993, one in which Cool Light and I are threatened with sanctions for our actions in initiating contact with one of the jurors in the case.

Who I Am

2. I am a naturalized American citizen; I was born in Romania, in Constanza, while the Germans were bombing the city, and in 1950, at the age of nine, I escaped communism with my family by hiding in the captain's quarters of a freighter bound for Greece. Our ultimate, intended destination was the United States, the land of democracy, freedom and justice.

3. Shortly after my arrival in America, I found a job working 60 hours a week. I continued my education — I knew little if any English when I arrived in this country — and I volunteered for service in the Marine Corps at the time of the Cuban missile crisis. I went on to become a respected and successful businessman in Boston, and later in California, where I established my own business.

4. I have been a good citizen of this country for more than 40 years. I have done nothing to warrant the Court's sanction; I have never, ever, acted with "willful blindness" or with "reckless disregard" for any law of this country.

The Assertion Of My Constitutional Rights

5. I elected to have the claims of Cool Light against GTE Products Corporation ("GTE") tried, to the extent permissible, to a jury because of my belief in the jury system — particularly in those cases in which a small company is taking on an influential American industrial giant — and my right to such an election.

6. I was unable to exercise my constitutional right to a retrial of my case to a jury — after Judge NcNaught had granted a new trial in August, 1990 — because I lacked the resources to bring all of the necessary witnesses back to Boston from California. Cool Light had been out of business for nearly a decade, and my other business interests, which had barely allowed me to bring my witnesses to Boston for the first trial, would simply not support anything like a repeat of that effort.

7. I did attempt to shift the venue of the case back to California — where I had originally filed my complaint in 1984 — on grounds that the Central District of California would be a much more convenient forum for a case in which 17 out of 23 witnesses at the first trial, including most of those called to testify by GTE, were from that state. The case had been sent to Boston in the first place on GTE's motion suggesting that the District of Massachusetts would be the more convenient forum. I had disagreed, had directed my California counsel to oppose GTE's motion, and at least in part because of his failure to oppose the motion properly, the case ended up in Massachusetts. I would estimate that the additional cost to me and to Cool Light of discovery and a jury trial a continent away from our "home" was approximately $250,000.00.

8. My motion to transfer the case back to California where I could have afforded to have my case retried to a jury was denied by this Court.

9. I have, in short, done everything I could within the federal judicial system to assert and maintain Cool Light's Seventh Amendment rights. I continue to do so. And now I find myself in the position of defending what I would have presumed to be my First Amendment right to speak, and to speak out publicly, about the truly nightmarish experience I have had, and I am still having, with the Courts.

Judge McNaught's Treatment Of My Case

10. I could not understand — and still cannot — how Judge McNaught was able, within the law, simply to erase the jury's verdicts in the case following the first trial. I have read and reread his August 9, 1990 order granting GTE a new trial; I could not understand how the liability aspects of those verdicts could be questioned, and I still cannot. I could not understand how the $6.5 million award of punitive damages could be questioned, and I still cannot. I had serious doubts about the propriety of Judge NcNaught's grant of a new trial, and I ultimately took those doubts to the First Circuit Court of Appeals.

11. I have read and reread the August 21, 1992 Opinion of the First Circuit Court of Appeals in Cool Light's case, and I have read and reread the Seventh Amendment to the United States Constitution. I still cannot understand what that Court meant when it said: "...there exists no violation of Seventh Amendment rights where a trial judge exercises his lawful discretion in awarding a new trial *where speculation and confusion are manifest in not only the verdict but the evidentiary record itself.*" [Emphasis added]. Nor can I understand what that Court meant when it said: "A judge should not enter judgment on a verdict *where it is impossible to understand the jury's intentions.*" [Emphasis added]. I knew, from his own words, that Judge NcNaught had questions in his mind as he listened to the jury's verdicts in the case, and that if

it was *impossible* to understand that jury's intentions, it was at least in part because Judge NcNaught — I believe purposefully left his questions unasked and remained silent when clarification could readily have been obtained.

12. Of course I also realize that my failure to understand — and therefore my inability to accept — the Courts' rulings which took away the jury's verdicts in Cool Light's favor is of no legal significance. I directed Cool Light's counsel to seek a rehearing, and rehearing *en banc*, from the Court of Appeals, even though I knew that the prospects for changing the result were minimal at best, and I also approved of the retention of two distinguished law professors — Lawrence G. Sager and Burt Neuborne, both on the faculty at New York University Law School — to assist Cool Light's trial counsel, Edwin A. McCabe, in the preparation of the necessary papers. I also directed them to begin the work necessary to petition the United States Supreme Court for a writ of *certiorari* in the case. Rehearing and rehearing *en banc* were denied by Order dated October 15, 1992; a petition was timely filed with the Supreme Court after the first of this year. The authors of that petition wrote: "The fact is that a multi-million dollar jury verdict has been set aside, and neither the parties, nor this Court, know why." I am clearly not alone in my failure to understand Judge NcNaught's ruling.

Why I Called The Jury Foreman

13. For reasons which I have already stated to the Court under oath in my prior affidavit in support of Cool Light's Rule 60(b)(6) motion, based upon my own reading and understanding of what Judge NcNaught had done, I believed that Cool Light was improperly denied the fruits of its jury verdicts by Judge NcNaught. And the First Circuit Court of Appeals based its Opinion, more than two years later, on the findings made after the second trial, rather obviously, I believe, to make up for the lack of any detailed findings of Judge McNaught on the matters which were the subject of the appeal. Cool Light, I believed in short, had been "robbed"

of the results of a fair trial. I wanted to shout that from the rooftops. No one within the judiciary system seemed to be listening; it was clear that I had to find other avenues, other means, of protest.

14. I decided, without consulting with my lawyers, that I would take my protests both to the media and to the Executive and Legislative Branches of the federal government. I realized that it would enhance the credibility of my protests if I were not "a voice crying in the wilderness." I believed that the jury in the Cool Light case, made up of well-educated and responsible people, had performed its work well; it had carefully listened to the evidence, weighed it, answered a series of detailed questions written by Judge NcNaught, and returned proper verdicts, some of which were in Cool Light's favor, many of which were not. I thought there was at least the possibility that one or more members of the jury would be as frustrated with the nullification of their work as I was, who might be persuaded to support my protests. I decided to find out. And I called Mr. Koerner with that in mind.

15. My efforts to enlist the support of Mr. Koerner were at least temporarily shelved because of the information which he imparted to Mr. McCabe in late September, 1992. But I have continued to take my case to the media and to the two other branches of government without them. I have initiated contact, directly or indirectly, with several members of the United States House of Representatives and of the Senate, with one former President, and with the United States Justice Department. I believe that I am well within my rights as a citizen to make my complaints heard wherever and however I can. I am going to continue to do so. Of course the terms of the Court's order of June 7 prevent me from any further contact with Mr. Koerner or any other member of the jury. I intend to challenge that order.

Mr. McCabe's Lack Of Involvement.

16. Mr. McCabe simply had no way of knowing of my intentions to contact Mr. Koerner. I did not inform him of my intentions. And he did nothing to prompt me to make the contact.

17. I had at one time asked Mr. McCabe to explain to me why he had not undertaken to attempt to make contact with any of the jury members, and he had responded by sending me a copy of the disciplinary rules by which he said he was bound and which, I could see, prohibited such contact without Court approval.[1] He also offered his view that it would be pointless to talk to the members of the jury because they had, after all, found in Cool Light's favor.

18. It did not occur to me, before I picked up the telephone and called Mr. Koerner, that it was in any way improper for me to make such a call. I was present in the courtroom when Judge NcNaught spoke of the prohibition against lawyers questioning the jurors about their verdicts, and although I did not really understand the reference at the time, I also heard his discussion of the meaning of the so-called *Kepreos* rule. He said that while it would be improper for any of the lawyers to speak to the jurors, nothing in the rule prevented the jurors from speaking to the lawyers. He said nothing to suggest that it would be wrong for me, or any other party, to speak with the jurors, and I had no reason to believe — and did not believe — that it would be wrong for me to do so.

19. When I telephoned Mr. Koerner, our conversation was not a lengthy one. I did not really have the opportunity to get into the purpose of my call with him before he told me of his post-trial correspondence with Judge McNaught, and of the general unhappiness of at least a number of the jurors that their work had been in vain. I was surprised to learn that Mr. Koerner had written to Judge McNaught and that Judge

[1] It is not my intention to waive the attorney-client privilege which I and Cool Light have with respect to our communications with Mr. McCabe or other lawyers in his offfice.

McNaught had written back; I had thought that any such contact would have been reported by the Court to my counsel at the time it occurred, I was also surprised to learn that several of the jury members had maintained contact with one another and had exchanged views about their experience at the trial and the events which followed. My first thought was that such matters might well have legal significance, and for that reason I asked Mr. Koerner to call Mr. McCabe and to relate to him what he had related to me.

20. At no time during my brief conversation with Mr. Koerner did we discuss the jury's deliberations or the verdicts it had reached.

21. After that first telephone conversation with Mr. Koerner, I did not speak with or have any other contact with Mr. Koerner or any other member of the jury until their respective affidavits had been prepared and submitted to them for their signatures. I did not in any way prompt Mr. Koerner to speak with any other member of the jury. He expressed his own concerns that Cool Light might have been the victim of Judge NcNaught's bias, prejudice and partiality. I did nothing — and to the best of my knowledge, Mr. McCabe did nothing — to create, prompt, foster or promote such concerns.

Mr. McCabe's Possible Disqualification

22. I understand the Court to have suggested that Mr. McCabe, by submitting an affidavit in support of Cool Light's Rule 60(b)(6) motion, may have disqualified himself from further representation of Cool Light's interests. I have read the Court's remarks at the scheduling conference held on June 29, 1993, and I want to be heard.

23. Mr. McCabe has been lead trial counsel in this case since mid-1987. He has now tried the case twice, argued it once before the First Circuit Court of Appeals (and submitted several other petitions and requests to that Court), and co-authored a petition for a writ of *certiorari* to the United States Supreme Court. There would seem to me to be no question that this case is headed back to the First Circuit, and perhaps beyond.

24. Mr. McCabe and others in his firm are representing Cool Light on a contingent fee basis. Not only is his knowledge and experience with the case irreplaceable; there is no reasonable prospect of finding his replacement, should that be required by the Court, on the same fee basis. The jury's verdict has been erased; the First Circuit Court of Appeals has affirmed; the United States Supreme Court has denied the petition for a writ of *certiorari*.

25. Mr. McCabe's disqualification to act as Cool Light's counsel would work a tremendous hardship on Cool Light, and might well inhibit or completely prevent Cool Light from challenging, on appeal, the Court's ruling on its Rule 60(b)(6) motion.

Conclusion

26. The Court's suggestion that the continued assertion of constitutional rights — and my inability to accept the judgment of a judge who pronounced me guilty of a serious crime to a jury in the privacy of his chambers — amounts to "sour grapes" is not warranted. The conclusions stated by the Court that I acted with "willful blindness" or "reckless disregard" for the law — and the use of those conclusions to bar me from pursuing whatever rights Cool Light may have because of Judge McNaught's partiality and bias — is simply unfair and unjust.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 4th day of August, 1993.

s/G. PANAGIOTOU
GEORGE PANAGIOTOU

Second Supplementary Affidavit

EDWIN A. McCABE, on his oath, deposes and says as follows:

Introduction

1. I am lead trial counsel of record for the plaintif in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation,* Civil Action No. 86-2668-K (the "Cool Light Case"); I am making this supplementary affidavit in response to the Court's findings, contained in its Memorandum and Order of June 7, 1993, to the effect that a *prima facie* case of my professional misconduct has been made.

2. I am mindful of the Court's admonitions about the limitations on affidavits, particularly lawyers' affidavits. My earlier affidavits were proffered because I was the recipient of the complaints of the four jurors who came forward, and felt that it was my duty to provide the Court, on my oath, with as many details of the events as I could. The Court has indicated that more detail was and is required; I submit it in this affidavit.

3. I am also submitting this affidavit because my professional conduct has been very publicly criticized by the Court, and my professional reputation and integrity have been tarnished, perhaps irretrievably, as a result. I believe that the Court's criticism was and is unreasonable, unwarranted and unfair. I have been a member of the United States District Court for the District of Massachusetts for more than twenty-five years, and I have enjoyed an unblemished record of accomplishment as an officer of the Court. I have no choice but to rise to my own defense.[1]

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[1] The Court found that "[T]he submissions before the court . . . are totally lacking in admissible evidence, by affidavit or otherwise, to support findings of fact sustaining these serious charges [of Judge NcNaught's partiality or bias]. This course of action is contrary to the statutory provisions for protection against public airing of unsubstantiated allegations in the context of complaints against judges, a forum for which is provided under 28 U.S.C. §372(C)(14)." Yet the Court accepted the affidavit of adversary counsel's secretary, reporting on her telephone conversation with an anonymous man who claimed to be one of the jurors in the case, as "evidence". And the Court should know that the statutory forum for a complaint against Judge McNaught was, indeed, utilized, although at first without result.

4. To the extent that this second supplementary affidavit addresses legal matters, it will only be to describe those factors which influenced my professional judgment and caused me reasonably to believe — and cause me still to belive — that Cool Light's motion under Rule 60(b)(6), Fed. R. Civ. P., was and is meritorious and based upon substantial, and still wholly unrefuted, evidence of actual bias, prejudice and partiality on the part of Judge McNaught. I believed, and believe, that Cool Light was and is fully entitled to the relief sought.

What I Did — And Did Not — Do

5. I did not know, prior to my receipt of Mr. Koerner's telephone call on September 9, 1992, that Mr. Panagiotou planned to call him or any other member of the jury in the Cool Light case, or in fact had done so. I learned that Mr. Panagiotou had called Mr. Koerner from Mr. Koerner during my first, very brief telephone conversation with him. I did nothing to prompt Mr. Panagiotou to call Mr. Koerner.

6. At no time did I in any way prompt, promote or encourage Mr. Koerner to contact any of the other jurors in the Cool Light case. I do not believe that Mr. Panagiotou did either. To the best of my knowledge, Mr. Panagiotou called only Mr. Koerner, and he called him o[illegible] once.

7. At no time did I initiate any contact or communication with any juror in the Cool Light case; each juror whose affidavit was later prepared and submitted to the Court initiated contact with me.

8. During my first telehone conversation with Mr. Koerner, he asked me about the status of the Cool Light case and I informed him that I had filed, a few days earlier, a motion seeking a rehearing and rehearing *en banc* from the First Circuit Court of Appeals. Mr. Koerner went on to say that he felt there was nothing confused or contradictory about the jury's verdict, that careful attention had been given to the evidence of damages (at which point I stopped him and reminded him that we were not allowed to discuss any aspect of the jury's deliberations) and that, in his view, the jury had

labored carefully and well before reaching its verdicts. In response, I told Mr. Koerner that I would consider whether an affidavit to that effect might properly be submitted to the First Circuit Court of Appeals.

9. I allowed myself even a brief telephone conversation with Mr. Koerner because when I picked up the ringing telephone, I was *then* unfamiliar with the First Circuit rule enunciated in the *Kepreos* case, never having had the occasion in twenty-six years of trial practice to even consider the rules concerning post-trial communications with jurors in Massachusetts. I did know, based upon my trial practice in a number of other state and federal courts in the United States, that post-trial juror communication was common practice in some jurisdictions. And all that I *then* knew of the *Kepreos* rule was what I had heard Judge McNaught say in his courtroom at the end of the Cool Light case; i.e., that nothing in the rule restricted a juror from initiating contact with the lawyers in the case. It never occurred to me that Judge McNaught might have misstated the rule, if in fact he did. I certainly did not believe that I was doing anything that could be seen as professionally improper by talking with Mr. Koerner when he first called me.

9. Two days after receiving Mr. Koerner's unsolicited (by me) telephone call, on September 11, 1992, with vague thoughts of a possible affidavit still in my mind, I informally consulted by telephone with a lawyer in Boston whom I knew to be expert in matters of professional conduct. In the course of my telephone conversation with him, he raised a question about the *Kepreos* case (although I do not believe he mentioned it by name), and he gave me the name of another Boston attorney[2] whom he believed had recently run afoul of the rule against post-trial communications with jurors. I rather quickly concluded — and he agreed — that it would be virtually impossible to work up an affidavit for the First Circuit Court of Appeals without discussing some aspect of

[2] Nancy Gertner, today a nominee to fill a vacancy on the Court.

the jury's deliberations; I also concluded that there would be little, if any, point to such a submission in any event. I simply dropped the idea.

10. I did not take any steps to inform Mr. Koerner of my conclusions. I neither called him nor wrote to him. I had no further communication with him until his telephone call to me on the night of September 29, 1992.

My Knowledge Of And Adherence To First Circuit Law

11. When Mr. Koerner — and a few minutes later, Ms. Livesey — telephoned me and informed me of Judge McNaught's comments about Mr. Panagiotou, the first conversation lasted, I would estimate, less than five minutes and the second less than three minutes. I told both of them that I had no idea what to do with the information they had brought to me, that I would have to do some research to determine what, if anything, could or should be done about it, and that I could not promise to communicate with either of them further.

12. Although I informed my two associate lawyers of the jurors' communications, I did not immediately direct either of them to do any research because of the press of other matters, and I did no such research of my own. My more immediate concern was an arbitration hearing scheduled to begin in Washington, D.C. on October 5 — before my convalescence from throat surgery was scheduled to be complete — and the need to prepare for it. I was also concerned with my preparation for oral argument in the First Circuit Court of Appeals in the case of *The pH Group Ltd.* v. *David L. Birch*, Appeal No. 92-1053. I acted as lead counsel in the arbitration proceedings for three days, flew to Boston and made my oral argument to the First Circuit on the 8th as scheduled. I then rested until my return full-time to my office on October 13.[3]

[3] The Court wonders in its June 7 Memorandum and Order what I and my associates were doing between September 29 and December 1, 1992 that prevented us from completing our research and reporting the jurors' charges of judicial misconduct sooner to the Court. Ours was and is a very active

13. On October 4, I received an unsolicited telephone call from a third juror, Mr. Swift — one which also lasted a matter of a few minutes — and prompted by that call, I turned my attention back to the Cool Light case. I did not initially do my own research on the First Circuit rule in the *Kepreos* case; I assigned the resarch to another lawyer in my office. I did, however, read the case, and its progeny, with care, before engaging in any further communication with any of the jurors.

14. I considered it my professional responsibility, both as an advocate for my client and as an officer of the Court, to deal properly with the concerns of the three jurors who had telephoned me. I examined the Canons of Ethics and Disciplinary Rules by which I was and am bound. I noted that DR 7-108, in which the ethical restrictions on post-trial communications with jurors are found, provides, in subsection (G), that "A lawyer shall reveal promptly to the court improper conduct . . . by another toward a venireman or a juror . . . of which the lawyer has knowledge." I noted as well, and carefully considred, that DR 8-102(B) provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

15. I also studied Rule 3:09 of the Rules of the Massachusetts Supreme Judicial Court, containing the Code of Judicial Conduct, not for its strict applicability to the problem at hand but for the sense of it.

16. And I considered my sworn duty to represent my client zealously within the bounds of the law.

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trial and appellate practice. In the two months in question, besides the three-day arbitration hearing and oral argument before the First Circuit, I acted as lead trial counsel in a second, four-day arbitration hearing in Boston and argued a second case to the First Circuit, along with taking and defending depositions and attending to the myriad other duties and reponsibilities which my practice entails. And my associates, while assisting in all of the foregoing, also spent more than 175 billed hours conducting discovery involving The Sea Crest, a Cape Cod resort hotel and conference center involved in a major RICO and securities fraud case pending before this Court.

17. I came to the conclusion that the First Circuit's rule against post-trial communication with jurors did not apply to the matter at hand. I had involuntarily received information which, if true, indicated that judicial misconduct had occurred. I came to the conclusion that it was my professional obligation to seek to verify the information I had received, and promptly to attend to the formalization — in the form of affidavits — of the jurors' concerns about judicial impropriety in order to be able to report them properly to the Court. I believed — and believe more firmly today — that there were and are powerful public policy and constitutional arguments against the application to the First Circuit's Rule under such circumstances. Whether I was right in that regard will ultimately rest with the judgment of the First Circuit. That eventual judgment will not, however, change the fact that the conclusions I reached — and still stand on — were the product of carefully-considered, reasonable professional judgment on my part.

My Adherence to Rule 11 Requirements

18. I concluded that the information given to me by the four jurors and now contained in their affidavits, when considered in the context of other facts and circumstances with which I was familiar, provided compelling evidence of actual bias, prejudice and partiality on the part of Judge McNaught, at least as of June 29, 1990, the day when he made his comments in chambers to the jurors. Specifically, I considered the following:

- In his comments to the assembled jurors (according to the memory of one of the jurors), Judge McNaught indicated that he was in possession of detailed information (e.g., the name of the airport where an arrest had occurred) concerning Mr. Panagiotou's indictment, fourteen years earlier, on drug-related charges.
- Judge McNaught did not inform counsel for Cool Light at any time that he had somehow come into

possession of such information concerning Mr. Panagiotou.

- Judge McNaught's comments to the jurors indicated that he accepted the allegations of the indictments against Mr. Panagiotou as true, even though all charges against Mr. Panagiotou had been dismissed on the motion of the government in early 1977, prior to any trial on the merits of those charges.
- The 1976 charges against Mr. Panagiotou were the subject of proceedings before Judge Walter J. Skinner (now a Senior District Judge), proceedings which were concluded, on information and belief, well before Judge McNaught's appointment to the federal bench. There is no apparent connection between Judge McNaught and the criminal proceedings; there is no apparent innocent explanation for Judge McNaught's possession of detailed information concerning those proceedings.
- Judge McNaught's comments to the jury came minutes after he had made findings from the bench as to those claims in the litigation which were not submitted to the jury, findings which were uniformly in favor of the defendant, GTE Products Corporation (GTE), and expressly based in part on Judge McNaught's articulated disbelief of Mr.Panagiotou's testimony in the case.
- Judge McNaught's comments to the jury came minutes after he had listened to the jury's verdicts in favor of Cool Light, realized (as he informed the parties at a hearing weeks later, on August 2, 1990) that there were questions to be put to the jury to clarify those verdicts, and elected to remain silent and to leave the questions unasked.
- Counsel in the *Cool Light* case appeared before Judge McNaught on August 2, 1990. At no time during that hearing, or at any other time, did Judge McNaught inform counsel for Cool Light that he

had come into possession of prejudicial information concerning Mr.Panagiotou.

- On August 9, 1990, Judge McNaught entered an order vacating all of the jury's verdicts in favor of Cool Light, as to both liability and damages, and its award of $6.5 million of punitive damages, citing his inability to answer questions about the jury's verdict which he intentionally left unasked while the jury was still in service and able to offer clarification of its verdicts. While he expressed concern over the possibility of a duplication of compensatory damages, he offered no articulated basis for vitiating the jury's award of punitive damages.
- The August 2 hearing was held well within the time for Cool Light to prepare and file a response to GTE's motion, so that Cool Light was not afforded the opportunity to marshal the evidence in support of the jury's verdicts.
- GTE, after a multiple-week trial, and with nearly a month to prepare its motions for judgment notwithstanding the verdict or for a new trial, did not rely on jury confusion or a lack of clarity in the jury's verdicts; Judge McNaught acted *sua sponte* in reaching his conclusions about the jury's verdicts.

19. I also considered that Judge McNaught had made findings and rulings just prior to his comments to the jury, and that those findings and rulings had not been the subject of a non-deferential review — i.e., a *de novo* review without according to the trial court the benefit of the doubt about an exercise of judicial discretion—either at a second trial or by the First Circuit Court of Appeals.

20. I also considered that Judge McNaught's rulings with respect to the jury's verdicts had not been the subject of the same sort of non-deferential review.

21. I also considered that, in the event it were to be established that the trial judge was partial or biased when he ordered a new trial, it could and should follow that the jury's

verdicts had *never* been accorded the necessary and appropriate *deferential* review which I believe the Seventh Amendment to the United States Constitution mandates.

22. In the exercise of my professional judgment, after appropriate inquiry and a careful consideration of both the facts and the law, concluded — and still believe — that the Rule 60(b)(6) motion which I filed on my client's behalf was well-grounded and warranted by existing law. It was not interposed for any improper purpose.

My Adherence To The Requirements Of DR 5-102

23. In September, 1992, I had been the lead trial counsel to Cool Light for more than five years. Within sixteen days of the telephone conversation in which Mr. Koerner first complained about possible judicial misconduct, the First Circuit denied the petition for rehearing, and rehearing *en banc* which I had filed on my client's behalf. The time for preparing and filing a petition for a writ of *certiorari* had begun to run.

24. In the affidavits which I submitted to the Court, I dealt with matters which only I could deal with: all of the circumstances of my initial contacts with the jurors, and other of my own observations and experiences during and after the trial. I did not, of course, deal with any of the facts of the litigation between the parties.

25. I considered that DR 5-102(A) specifically permits the lawyer who must also be a witness to continue his representation of his client if his refusal to do so would work a substantial hardship on the client. Then and now, my inability to continue to represent Cool Light — given the distinctive value of my knowledge and experience with respect to its case against GTE — would work such a hardship.

26. Further, at the time I prepared and filed my two affidavits, I concluded that my obligation, as an officer of the Court, to provide the Court with sworn evidence concerning

jurors' complaints to me of possible judicial misconduct would not and should not lead to my disqualification as Cool Light's lawyer.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY this 5th day of August , 1993.

s/E.A. McCabe
Edwin A. McCabe

[LETTERHEAD-THE MCCABE GROUP]

December 1, 1992

VIA HAND DELIVERY

Francis P. Scigliano
Clerk, United States Court of Appeals
for the First Circuit
United States Post Office and Courthouse
Boston, MA 02110

Re: John J. McNaught,
United States District Court Judge (retired)

Dear Mr. Scigliano:

With this letter I am delivering to you a copy of a motion which is being filed today in the United States District Court for the District of Massachusetts in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-K. The motion seeks relief from orders, proceedings and a judgment, pursuant to Fed. R. Civ. P. 60(b)(6), based upon the alleged violation by Judge McNaught of 28 U.S.C., Sec. 455(a) and (b).

I have been unable to determine whether 28 U.S.C., Sec. 372(c) confers jurisdiction upon your court to deal with allegations of misconduct against a district judge who has retired, as I understand Judge McNaught has. If it does, I ask that this letter, and the enclosed motion and supporting papers, be considered a complaint filed in accordance with Sec. 372(c)(1) on behalf of my client, the plaintiff in the action and the moving party below, and the Court take such action with respect to the complaint as it deems appropriate.

I have taken the liberty of providing Judge McNaught with a copy of this letter and its enclosures.

Very truly yours,

s/E.A. McCabe
Edwin A. McCabe

cc: John J. McNaught, Esq.
George Panagiotou

OFFFICE OF THE CIRCUIT EXECUTIVE
JUDICIAL COUNCIL OF THE FIRST CIRCUIT
J.W. McCormack Post Office and Courthouse
Boston, Massachusetts 02109

VINCENT F. FLANAGAN
CIRCUIT EXECUTIVE

ROOM 1403
617-223-9049

December 2, 1992

Edwin A. McCabe, Esq.
The McCabe Group
25 First Street
Cambridge, MA 02141-1810

Dear Mr. McCabe:

Francis P. Scigliano, Clerk of the United States Court of Appeals for the First Circuit, has forwarded to me your letter of December 1, 1992, regarding retired Judge John J. McNaught, together with attachments.

In this letter, you have requested that it be treated as a complaint of judicial misconduct, if 28 U.S.C. § 372(c) applies to a retired judge. However, the act does not apply to retired judges. Therefore, I am returning your letter and attachments to you.

If you have any further questions, please contact me.

Sincerely yours,

s/Vincent Flanagan
Vincent Flanagan

JUDICIAL COUNCIL OF THE FIRST CIRCUIT

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

Mail this form to the Clerk, United States Court of Appeals, 1606 John W. McCormack Post Office & Courthouse, Boston, Massachusetts 02109. Mark the envelopes "Judicial Misconduct Complaint" or "Judicial Disability Complaint." Do not put the Name of the Judge or Magistrate on the envelope.

See Rule 2(e) for the number of copies required.

1. Complainant's name; Edwin A. McCabe, Esq.
   Address; The McCabe Group, Twenty-Five First Street Cambridge, MA 02141
   Daytime telephone: (617) 494-1110
2. Judge or magistrate complained about:
   Name: Honorable John J. McNaught, Honorable Robert E. Keeton
   Court: United States District Court, District of Massachusetts
3. Does this complaint concern the behavior of the judge or magistrate in a particular lawsuit or lawsuits?
   [x] Yes [ ] No
   If "yes," give the following information about each lawsuit (use the reverese side if there is more than one):

   Court: United States District Court, District of Massachusetts

   Docket number: 86-2668K

   Are (were) you a party or lawyer in the lawsuit?
   [ ] Party [X] Lawyer [ ] Neither

   If a party, give the name, address, and telephone number of your lawyer:

   Docket numbers of any appeals to the First Circuit:
   No. 92-1082

4. Have you filed any lawsuits against the judge or magistrate?

[ ] Yes [X] No

If "Yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court:

Docket number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5. On seperate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See rule 2(b) and 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

6. You should either

(1) check the first box below and sign this form in the presence of a notary public; or

(2) check the second box and sign the form. You do not need a notary public if you check the second box.

[X] I swear (affirm) that —

[ ] I declare under penalty of perjury that —

(1) I have read rules 1 and 2 of the Rules of the Judicial Council of the First Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

s/E.A. McCabe

(Signature)

Executed on June 29, 1993

(Date)

Sworn and subscribed to before me

6/29/93

s/ Lillie A. Milliner

(Notary Public)

My Commission expires: 7/3/98

STATEMENT OF FACTS

Pursuant to Rule 2(b) of the Rules of the Judicial Counsel of the First Circuit Governing Complaints of Judicial Misconduct, the complaining parties submit this Statement of Facts. It is alleged that each of the judges named in the complaint to which this Statement of Facts is appended has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.

One complaint concerning the conduct of two judges is being filed, in accordance with the Commentary on Rule 2, because of the factual and legal relationship between the conduct complained of.

The Complaint Against Judge McNaught

There is, we submit, compelling evidence that Judge McNaught, while in office, disregarded the mandate of 28 U.S.C. §455(a) and (b)(l) by failing to disqualify himself as the trial judge in the case of *Cool Light Company, Inc.* v. *GTE Products Corporation*, Civil Action No. 86-2668-Mc (now 86-2668-K, the case having been transferred to Judge Keeton after Judge McNaught's retirement).

We further submit that there is, at the very least, sufficient evidence in support of the allegations of the preceding paragraph to warrant the prompt appointment, pursuant to 28 U.S.C. §372(c)(4), of a special committee to investigate the facts in support of the allegations in question.

The facts, consisting in part of the documents contained in the Appendix submitted in support of the complaint,[1] are as follows:

---

[1] As indicated in footnotes at the beginning of a Memorandum and Order issued by Judge Keeton on June 7, 1993, there have been numerous submissions to the District Court in connection with this matter. Because of the sheer bulk of those materials, and because the complaints are not intended to be directly related to the merits of any decision or procedural ruling by either judge, they have not been included in the Appendix filed with this complaint pursuant to the provisions of Rule 2(b) of the Rules. Copies of any and all such materials will, of course, be made available upon request.

- On June 29, 1990, immediately following the conclusion of a jury trial in the *Cool Light* case, Judge McNaught informed the assembled jurors (out of the presence of Cool Light's counsel) that he disagreed totally with their verdicts in favor of Cool Light and that he — Judge McNaught — had information that the company's principal, George Panagiotou, had been involved in drug dealing. Four of the jurors to whom Judge McNaught's remarks were made in chambers have submitted affidavits concerning the incident; copies of their affidavits are included in the Appendix as Exhibits "A" through "D".
- In his comments to the assembled jurors (according to the memory of one of the jurors), Judge McNaught indicated that he was in possession of detailed information (e.g., the name of the airport where an arrest had occurred) concerning Mr. Panagiotou's indictment, fourteen years earlier, on drug-related charges.
- Judge McNaught did not inform counsel for Cool Light at any time that he had somehow come into possession of such information concerning Mr. Panagiotou.
- Judge McNaught's comments to the jurors indicated that he accepted the allegations of the indictments against Mr. Panagiotou as true, even though all charges against Mr.Panagiotou had been dismissed on the motion of the government in early 1977, prior to any trial on the merits of those charges.
- Judge McNaught has never denied that he made the comments attributed to him by the sworn statements of four of the jurors, nor has he ever offered any explanation for his possession of such information. It is believed that one or more of Judge McNaught's law clerks were present in chambers when the remarks were made; none of them have denied that the comments were made.

- The 1976 charges against Mr. Panagiotou were the subject of proceedings before Judge Walter J. Skinner (now a Senior District Judge), proceedings which were concluded, on information and belief, well before Judge McNaught's appointment to the federal bench. There is no apparent connection between Judge McNaught and the criminal proceedings; there is no apparent innocent explanation for Judge McNaught's possession of detailed information concerning those proceedings.
- Judge McNaught's comments to the jury came minutes after he made findings from the bench as to those claims in the litigation which were not submitted to the jury, findings which were uniformly in favor of the defendant, GTE Products Corporation ("GTE"), and expressly based in part on Judge McNaught's articulated disbelief of Mr.Panagiotou's testimony in the case.
- Judge McNaught's comments to the jury came minutes after he had listened to the jury's verdicts in favor of Cool Light, realized (as he informed the parties at a hearing weeks later, on August 2, 1990) that there were questions to be put to the jury to clarify those verdicts, and elected to remain silent and to leave the questions unasked. Portions of the transcript which contain Judge McNaught's comments on August 2, 1990 are included in the Appendix as Exhibit "E"; the pages in question are pp. A-302 and A-303.
- Judge McNaught's expressed disagreement with the jury's verdicts in favor of Cool Light, and his immediately following statements concerning Mr. Panagiotou's "drug dealing" constitute evidence of actual, personal bias or prejudice concerning Cool Light and Mr.Panagiotou, or at the very least bring into reasonable question his impartiality.

- Counsel in the *Cool Light* case appeared before Judge McNaught on August 2, 1990. At no time during that hearing, or at any other time, did Judge McNaught inform counsel for Cool Light that he had come into possession of prejudicial information concerning Mr. Panagiotou.
- On August 9, 1990, Judge McNaught entered an order vacating all of the jury's verdicts in favor of Cool Light, as to both liability and damages, and its award of $6.5 million of punitive damages, citing his inability to answer questions about the jury's verdict which he intentionally left unasked while the jury was still in service and able to offer clarification of its verdicts. While he expressed concern over the possibility of a duplication of compensatory damages, he offered no articulated basis for vitiating the jury's award of punitive damages.

It is submitted that the foregoing facts and circumstances mandate a further investigation into Judge McNaught's possession of information concerning the 1976 drug-related charges against Mr. Panagiotou, his seeming acceptance of the truth of those charges notwithstanding their dismissal in 1977, and his articulation of bias against Cool Light in his post-trial remarks to the jury in his chambers.

The Complaint Against Judge Keeton

On June 7, 1993, Judge Keeton issued a Memorandum and Order denying, without a hearing, Cool Light's motion for relief under Rule 60(b)(6) Fed. R. Civ. P., a motion based in large part upon the facts and circumstances described above. A copy of that Memorandum and Order is included in the Appendix as Exhibit "F".

It must be emphasized that the purpose of this complaint is not to raise issues concerning the substantive rulings of Judge Keeton in his June 7 Memorandum and Order. Those issues will be the subject of appellate procedures — a Notice of Appeal has been filed in the District Court — in the ordi-

nary course. Nor is it the purpose of this complaint to raise issues concerning the threatened coompensatory sanctions against Cool Light, its counsel and Mr.Panagiotou. Those issues, too, will be the subject of appellate review, if necessary, at the appropriate time.

The basis for the complaint against Judge Keeton is as follows:

- After considering the affidavits of four jurors, affidavits which provide compelling evidence of Judge McNaught's actual, expressed bias or prejudice against Cool Light and Mr. Panagiotou, or at the very least the appearance of partiality, Judge Keeton foreclosed all further investigation of the facts and circumstances related in those affidavits, and all further communication with any of the jurors, by Cool Light or its counsel.
- Judge Keeton declined to interview any of the jurors or to inquire into any of the circumstances of Judge McNaught's possession of prejudicial information about Mr. Pangiotou.
- Judge Keeton also declined to cause the appointment of a United States Magistrate to conduct such appropriate inquiries (a motion seeking such an appointment, filed by Cool Light, was denied without hearing).
- Judge Keeton's refusal to permit or conduct further inquiry into the allegations of bias or prejudice, or the appearance of partiality, and his elimination of the opportunity for Cool Light to gather and offer evidence (Judge Keeton has refused to permit any further communication with the members of the jury and has foreclosed discovery with respect to the source of Judge McNaught's information concerning the drug-related charges against Mr. Panagiotou), give the appearance of a cover-up or whitewash of the jurors' sworn allegations concerning Judge McNaught's seeming bias or prejudice.

- Judge Keeton's refusal to permit or conduct further factual inquiry into the facts and circumstances of alleged bias or prejudice will leave the First Circuit Court of Appeals with an incomplete and inadequate record on which to consider the issues raised by Cool Light's Rule 60(b)(6) motion, which in turn may lead to a remand in order that factual findings be developed. In that sense, the June 7 Memorandum and Order of Judge Keeton is likely to prevent an expeditious determination of the merits of that motion. *See Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

[LETTERHEAD - OFFICE OF THE CIRCUIT EXECUTIVE]

JUDICIAL COUNCIL OF THE FIRST CIRCUIT

JULY 7, 1993

EDWIN A. MCCABE, ESQ.
THE MCCABE GROUP
25 First Street
Cambridge, MA 02141

Complaint No. 145

Dear Mr. McCabe:

This to acknowledge receipt of your complaint and to inform you that it is now being processed.

Sincerely yours,

s/VINCENT FLANAGAN
Circuit Executive

[LETTERHEAD- THE McCABE GROUP]

September 10, 1993

VIA HAND DELIVERY

Francis P. Scigliano
Clerk, United States Court of Appeals
for the First Circuit
United States Post Office and Courthouse
Post Office Square
Boston, MA 02109

RE: PETITION FOR REVIEW —COMPLAINT AGAINST JOHN J. MCNAUGHT, UNITED STATES DISTRICT COURT JUDGE (RETIRED), AND ROBERT E. KEETON, UNITED STATES DISTRICT COURT JUDGE

Dear Mr. Scigliano:

I hereby petition the Judicial Counsel for review of the August 25, 1993 Order of Breyer, C.J. disposing of the above referenced misconduct complaint.

Chief Judge Breyer, in his Order, concluded that the complaint procedure of 28 U.S.C. §372(a) *et seq* applies only to sitting federal judges, and not to a retired judge who is no longer eligible to exercise judicial duties. He went on to emphasize that the statutory scheme is intended to address systemic problems in the administration of justice, and not to deal with the conduct — or alleged misconduct — of the retired judge "personally":

- "Local Rule l(a) . . . explains that 'the purpose of the complaint procedure is to improve the administration of justice in the federal courts . . . . The law's purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.'" Order, p. 2.
- "Investigating allegations against a former judge who is no longer part of the federal court system

ordinarily could do nothing to improve the administration of justice in the federal courts." [Emphasis added]. Order, P. 2.

- "In any event, allegations such as those made in the instant complaint — that a particular judge deliberately failed to recuse, or reached rulings on the basis of improper or illicit motives — are specifically limited to the conduct of the retired judge personally, and raise no possibility of correcting undesirable practices in the court generally. There is, as a consequence, no occasion for inquiry into these allegations." Order, p. 3.

With all due respect, this is not the ordinary case. And as 28 U.S.C. §372(c)(6)(B) makes clear, the "action" which can be taken on a complaint is not restricted by specific definition; the statute looks to the Chief Judge and the special committee to be appointed by him for the fashioning of broad remedial relief to meet any proper complaint made.

The complaint in this instance is quite specific about the judicial misconduct complained of, and the inferences which the complainant would have Chief Judge Breyer draw from the facts which are known. Rule 6(a) precludes the repetition of those facts and inferences in this petition. To the extent that the complaint must "hint" and "suggest" and "lack adequate factual particulars" with respect to at least some of the circumstances of the alleged misconduct — as Chief Judge Breyer notes in his Order — it must do so for only one reason: The First Judge has offered no explanation for his apparent possession of derogatory, indeed *per se* defamatory, information concerning Mr. Panagiotou, or for his post-verdict recitation of that information to the jury in the context of his stated disagreement with the jury's verdicts in favor of the plaintiff, or for his failure to disclose to plaintiff's counsel the fact of his possession of such information and its source.

And while the complaint did not intend even to suggest that the Second Judge against whom the complaint was made acted with improper motive — which is why it contains not

even a bare allegation in that regard, as Chief Judge Breyer notes — the Second Judge's ruling barring all discovery presents a classic case of Catch 22: while prohibiting the plaintiff from making any inquiry as to the source and circumstances of the First Judge's possession, and post-verdict recitation to the jury, of wholly irrelevant and immaterial — but highly prejudicial — information concerning Mr. Panagiotou, the Second Judge dismissively characterizes the plaintiff's accusations of judicial misconduct by the First Judge as "vague" and "wholly unsupported".

The Second Judge has suggested that an Article III court "is not a forum for adjudicating the merits of accusations against a retired judge (or, for that matter, even an active judge) of the court." June 7, 1993 Memorandum and Order, at pp. 29-30. His stated preference is for consideration of such accusations, at least in some instances, pursuant to 28 U.S.C. §372(c). *Id.*, pp.31-32. It is, of course, precisely that consideration which Chief Judge Breyer, in his August 25 Order, has ruled out.

Thus it may be that Chief Judge Breyer's decision in this matter, taken together with the Second Judge's rulings barring discovery, mean that retirement by a judicial officer, in and of itself, effectively precludes all inquiry concerning his alleged misconduct while acting as a sitting judge, notwithstanding the potential conclusive impact of such misconduct on the outcome of a pending case. It is submitted that nothing in the statute, and no logic or jurisprudence, compels such a conclusion.

The Relief Sought By This Petition

By this petition for review, the complainant seeks (a) to reverse the disposition — dismissal — of his complaint by Chief Judge Breyer, (b) a determination that the Chief Judge, or a special committee appointed by him, has the power under 28 U.S.C. §372(c) to require any retired judge to cooperate in an inquiry into allegations of his or her judicial misconduct, and (c) a directive to the First Judge to offer a detailed, sworn statement of the facts and circumstances pertaining to his possession and recitation to the jury of derogatory information concerning Mr.Panagiotou, or a directive to the Second Judge to conduct or permit such inquiry as may be appropriate into such facts and circumstances.

Respectfully submitted,

s/E. A. McCabe
Edwin A. McCabe

cc: George Panagiotou

ADDENDUM

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . .

§ 372. Retirement for disability; substitute judge on failure to retire; judicial discipline

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the

term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may —

> (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or
>
> (B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly —

> (A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint:
>
> (B) certify the complaint and any other documents pertaining thereto to each member of such committee; and
>
> (C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

* * *

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection

may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

Supreme Court, U.S.
FILED
OCT 14 1994
OFFICE OF THE CLERK

No. 94-479

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

COOL LIGHT COMPANY, INC.,

Petitioner,

v.

GTE PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ALLAN VAN GESTEL
(Counsel of Record)
JOHN B. DAUKAS
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000
Counsel for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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No. 94-479

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

COOL LIGHT COMPANY, INC.,

Petitioner,

v.

GTE PRODUCTS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

We have passed this way before. The instant Certiorari Petition of Cool Light Company, Inc. ("Petitioner") is Petitioner's *tenth* attempt to reinstate a flawed jury verdict and its second Certiorari Petition to this Court.

GTE Products Corporation ("Respondent")[1] files this brief pursuant to Rule 15 of the Rules of the Supreme Court of the United States in opposition to the petition for a writ of certiorari of Petitioner. Though Respondent vigorously maintains that the First Circuit Court of Appeals' decision from which Petititioner seeks relief is correct, it will not here address the merits of that decision. Instead, Respondent asks this Court to deny the petition because (1) the status and procedural posture of this case are such that any resolution of the issues raised by Petitioner would not entitle it to any relief and would have no effect on the ultimate outcome of this action, and (2) Respondent is a stranger to the non-public judicial misconduct action initiated by Petitioner with former First Circuit Court of Appeals Chief Judge Breyer (now Justice Breyer), and should not be burdened with responding to Petitioner's complaints regarding that proceeding.

STATEMENT OF THE CASE

The parties initially tried this action to a judge (McNaught, J.) and a jury in the spring and early summer of 1990. Memorandum and Order, June 7, 1993 (Keeton,

---

[1] On January 29, 1993, Respondent was purchased by Osram GmbH and changed its name to Osram Sylvania, Inc. Pursuant to Rule 29:1 of the Rules of this Court, Respondent states as follows: Osram Sylvania, Inc. is a Delaware corporation which is a wholly-owned subsidiary of Osram GmbH, which is a wholly-owned subsidiary of Siemens A.G. Osram Sylvania, Inc. does not have any non-wholly owned subsidiaries. Prior to January 29, 1993, GTE Products Corporation was a wholly-owned subsidiary of GTE Products of Connecticut Corporation, a Connecticut corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation, a New York corporation. For simplicity sake, Osram Sylvania, Inc. will be referred to herein as "GTE Products Corporation" or "Respondent."

J.), A-21.* The jury returned a verdict in favor of Petitioner on three out of six counts and awarded it compensatory damages on each of the three counts and substantial punitive damages under California law. Jury Verdict Forms, A-92 through A-100. Respondent moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial on the grounds, among others, that the verdict was against the clear weight of the evidence, that the damages awarded were excessive, and that the jury made multiple and inconsistent awards for the same claimed injury. Memorandum and Order, June 7, 1993 (Keeton, J.). A-23.

On August 9, 1990, Judge McNaught ordered a new trial on all counts tried to the jury, including those on which the verdicts went against the Petitioner. *Id.* at A-23.

Petitioner thereafter sought reconsideration from Judge McNaught of his new trial order, which was denied on August 29, 1990; a writ of mandamus from the Court of Appeals directing Judge McNaught to reinstate the jury verdicts, which was denied on October 22, 1990; and, after Judge McNaught's retirement and reassignment of the case to Judge Keeton, reconsideration of the new trial order from Judge Keeton, which was denied on July 25, 1991. *Id.* at A-24.

Next, Petitioner strategically chose to waive its right to a jury in the retrial, and to waive all but the three claims it had prevailed on before the jury. *Id.* At the close of the second trial, Judge Keeton ruled in favor of Respondent on all of Petitioner's claims, for several separate and independent reasons including Petitioner's:

***The citations herein are to the Appendix included in the Petition.**

failure to prove causation of harm, failure to prove breach of contract, failure to prove breach of implied duty of good faith and fair dealing, failure to prove fraud, and failure to prove damages. *Id.* at A-24 through A-25. Though having the opportunity to do so, Petitioner chose not to appeal Judge Keeton's findings, *id.* at A-25, and they are now the law of the case. Instead, Petitioner elected to appeal *only* Judge McNaught's decision to vacate the jury verdict and grant a new trial.

The Court of Appeals for the First Circuit affirmed Judge McNaught's new trial decision in an opinion dated August 21, 1992. *Id.* at A-25. Petitioner's subsequent petition for rehearing or rehearing en banc was denied by the Court of Appeals on October 15, 1992. *Id.* at A-25. Thereafter, this Court denied Petitioner's first petition for a writ of certiorari. *Cool Light Company, Inc. v. GTE Products Corp.*, 973 F.2d 31 (1st Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1417 (1993).

After the First Circuit affirmed Judge McNaught's decision granting a new trial, Petitioner initiated a campaign of contacting and soliciting affidavits from jurors who served during the first trial. Memorandum and Order, June 7, 1993 (Keeton, J.), A-29 through A-30 and A-46 through A-49. After the First Circuit denied Petitioner's petition for rehearing or rehearing en banc, on November 30, 1992, Petitioner filed a motion pursuant to Fed. R. Civ. P. 60(b)(6) accusing Judge McNaught of judicial misconduct and seeking to set aside his grant of a new trial and to reinstate the jury verdict in its favor. Plaintiff's Motion Seeking Relief from Orders and Judgment Pursuant to Fed. R. Civ. P. 60(b)-(6), A-59 through A-63. Judge Keeton found Petitioner's account of its contacts with jurors highly suspect and determined that Petitioner and its counsel had violated First Circuit law regarding post-verdict contact with

jurors and had violated Fed. R. Civ. P. 11 and scheduled a hearing to consider whether sanctions should be imposed. Memorandum and Order, June 7, 1993 (Keeton, J.), A-46 through A-50 and A-52 through A-53. Judge Keeton denied Petitioner's Rule 60(b)(6) Motion on the grounds, among others, that as Petitioner had already received a new trial before a new judge on terms of its choosing which resulted in a decision denying all its claims, from which it did not appeal, Petitioner was not entitled to further relief. *Id.* at A-35 through A-40. In an abundance of caution, Judge Keeton also undertook that which Petitioner sought and conducted a *de novo* review of Judge McNaught's decision granting a new trial. *Id.* at A-37 through A-38. Judge Keeton concluded that Judge McNaught's decision was warranted (indeed found that a judgment notwithstanding the verdict might have been more appropriate than a new trial order). *Id.* at A-38.

Respondent informed Judge Keeton that it wished to conclude this action, which had been pending since 1986, and that it therefore declined the Court's invitation to seek Rule 11 sanctions from Petitioner and its counsel. Memorandum, August 12, 1993 (Keeton, J.), A-55 through A-56. The District Court entered a final order denying Petitioner's Rule 60(b)(6) Motion on August 6, 1993. Final Order, August 6, 1993 (Keeton, J.), A-57.

Petitioner appealed Judge Keeton's decision denying its Rule 60(b)(6) Motion to the United States Court of Appeals for the First Circuit. *Cool Light Company, Inc. v. GTE Products Corp.*, 24 F.3d 349 (1st Cir. 1994) (Breyer, C.J.), A-1 through A-10. The First Circuit affirmed the denial of Petitioner's Rule 60(b)(6) Motion. *Id.* at A-10. The Court of Appeals assumed for argument sake that the allegations against Judge McNaught were

true and that Judge McNaught should have recused himself. *Id.* at A-6. Nonetheless, the Court of Appeals affirmed Judge Keeton's decision, holding:

> Had Judge McNaught recused himself, [Petitioner] would have had a new trial before a different judge. *Pontarelli v. Stone,* 978 F.2d 773, 775 (1st Cir. 1992). [Petitioner], however, did have a new trial before a different judge. And the law entitles it to no more.

Id. at A-7. The First Circuit further ruled that the unappealed decision of Judge Keeton from the second trial would prohibit Petitioner from recovering on any of its claims at a third trial, and that "any further trial on related matters would simply prove 'an empty exercise.' " *Id.* at A-8 and A-10. Finally, the Court of Appeals found that Judge Keeton had provided Petitioner with precisely what it requested: an independent *de novo* review of Judge McNaught's "new trial" decision, with appropriate deference for the jury verdict, and that Judge Keeton had reasonably found that the jury verdict from the first trial should have been set aside and that "a new trial should have been granted, if indeed the court did not instead order judgment for [Respondent] notwithstanding the verdict." *Id.* at A-9.

Petitioner next petitioned for rehearing or rehearing en banc, which was denied on June 16, 1994. Order of the Court, June 16, 1994, A-58. As a result of Exhibits attached by Petitioner to its Petition for Rehearing or Rehearing In Banc (sic), Respondent, for the first time, learned that Petitioner's counsel had brought judicial misconduct claims against both Judge McNaught and Judge Keeton. *Complaint v. McNaught, J. and Keeton, J. pursuant to 28 U.S.C. §372(c),* June 29, 1993, A-144 through A-151. This Complaint apparently lead to the

decision of then Chief Judge Breyer, from which Petitioner now complains. Order, August 25, 1993 (Breyer, C.J.), A-12 through A-17. Respondent has had absolutely no involvement in the Judicial Misconduct proceedings initiated by Petitioner, nor was it even aware of their existence until their recent revelation.

ARGUMENT

A. It Would Be Improvident To Grant Certiorari As Petitioner Is Not Entitled To Any Further or Different Relief Below Even If It Could Prevail On The Merits Of Its Argument To This Court.

While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Court of Appeals is judicial, not simply administrative or managerial.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). The Court has recognized that when the resolution of a legal issue is irrelevant to the ultimate outcome of the case, as it is here, certiorari should be denied. *See, e.g., New York v. Uplinger,* 467 U.S. 246 (1984) (writ of certiorari dismissed as improvidently granted where federal question not clearly framed and challenged decision based on other decision from which review not sought); *Belcher v. Stengel,* 429 U.S. 118 (1976) (writ of certiorari dismissed as improvidently granted where full briefing and oral argument demonstrated additional grounds supporting lower court decision beyond basis challenged in petition for certiorari); *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477, 491 n.16

(1960) (certiorari should be denied where litigation is not meaningful to the parties); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, §4.4, pages 201-202 (6th Ed. 1986) (citing *Somerville v. United States,* 376 U.S. 909 (1964), as case where certiorari denied because resolution of the conflict would not change result reached below). *Cf. Muskrat v. United States,* 219 U.S. 346 (1911) (Court will not issue advisory opinions).

First, should Petitioner succeed on its argument that Judge McNaught should have recused himself, the only relief to which it then would be entitled would be a new trial before a different judge. Here, Petitioner already has received such relief. Second, remand for a third trial would be a fruitless exercise as Judge Keeton's findings from the second trial, from which Petitioner failed to appeal, are now the law of the case and effectively prohibit Petitioner from recovering on any of its claims. Third, Petitioner has already received the relief it now seeks: *de novo* review of Judge McNaught's new trial order. Fourth, reversing the New Trial Order would effectively deny Respondent its right to have a ruling on its Motion for Judgment Notwithstanding the Verdict or For a New Trial which it made at the close of the first trial. Finally, it would be a miscarrige of justice to reinstate the jury verdicts which the District Court and First Circuit found to be internally inconsistent, and concerning which this Court previously denied certiorari.

1. Petitioner Has Already Had the Only Relief to Which it Would be Entitled.

To be entitled to relief under Rule 60(b)(6), a litigant must demonstrate that vacating a contested judgment will not be an empty exercise. *Cotto v. U.S.,* 993 F.2d 274,

280 (1st Cir. 1993); *Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Trans. Co.*, 953 F.2d 17, 20 (1st Cir. 1992) (collecting cases); *see also* Fed. R. Civ. P. 61. Granting Petitioner relief would be futile because Petitioner has already had the only relief to which it would be entitled under its motion, that is, a "second trial before a highly competent and fair-minded [different] judge," *Cool Light Co. v. GTE Products Corp.*, 973 F.2d 31, 36 (1st Cir.), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 1417 (1993), on terms of its own choosing. *See Pontarelli v. Stone*, 978 F.2d 773, 775 (1st Cir. 1992) ("If a trial judge has wrongly failed to disqualify him or herself, the remedy to correct this situation is for the appellate court to reverse the decision of the case on the merits and to order a new trial before a different judge."); *see also Comacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 490 (1st Cir. 1989) (appellate court having "independently confirmed the correctness of the lower court's decision," the trial "judge's refusal to recuse himself was, at worst, harmless error" thereby rendering moot the matter of disqualification). *Cf. Fashion House v. K-Mart*, 892 F.2d 1076, 1096 (1st Cir. 1989) (noting that remand of a case in the District of Rhode Island for retrial would result in reassignment to a new trial judge, thereby rendering moot an attack on the initial trial judge's fairness and demeanor). As Petitioner has already been granted the only relief to which it would be entitled were it able to prove its scandalous charges against Judge McNaught, its petition should be denied as moot. Petitioner is not entitled to yet a third trial.

2. Judge Keeton's Unappealed Findings In The Second Trial Are Now Law Of The Case, Foreclosing Any Further Relief To Petitioner.

Judge Keeton ruled in favor of Respondent as to all Petitioner's claims at the end of the second trial in this matter. Judgment, May 25, 1994 (Breyer, C.J.), A-7 through A-10. Judge Keeton found, among other things, that Respondent did not cause the harm Petitioner alleged, that Respondent had not breached its agreement with Petitioner, that Respondent did not commit fraud, and that Petitioner failed to prove damages with sufficient specificity. *Id.* at A-7. Judge Keeton's decision has not been appealed from and is now the law of the case. *See generally Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988) (approving law of the case doctrine); *Lacy v. Gardino,* 791 F.2d 980, 984 (1st Cir.) (law of the case doctrine makes binding upon court a ruling by a court of the same or higher level made during prior stages of the same litigation), *cert. denied,* 479 U.S. 888 (1986); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 250 (D.C. Cir. 1987) (law of the case doctrine requires that legal decision made at one stage of litigation which is unchallenged in subsequent appeal when opportunity to do so existed becomes law of the case for future stages of same litigation and parties are deemed to have waived right to challenge that decision at later time); *Laffey v. Northwest Airlines, Inc.,* 740 F.2d 1071, 1089-1090 and 1102-1103 (D.C. Cir. 1984) (unappealed lower court decisions are law of the case in proceedings after remand), *cert. denied,* 469 U.S. 1181 (1985); *Munoz v. Imperial County,* 667 F.2d 811, 817 (9th Cir.) (same), *cert. denied,* 459 U.S. 825 (1982); *Fogel v. Chestnutt,* 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that

a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."), *cert. denied,* 459 U.S. 828 (1982); J. Moore, J. Lucas & T. Currier, 1B Moore's Federal Practice, §0.404[1] and 4.-3] (1992). In short, Judge Keeton's decision that Petitioner has no case, unappealed by Petitioner and respected by the Court of Appeals, would be binding were this case remanded.

3. To Reinstate the Jury Verdicts Would Effectively Deny Respondent Its Right to Have a Ruling on Its Motion for JNOV or a New Trial.

After the jury in the first trial rendered its verdicts, Respondent moved, as was its right under the Federal Rules of Civil Procedure, for a judgment notwithstanding the verdict and, in the alternative, for a new trial. Memorandum and Order, June 7, 1993 (Keeton, J.), A-22 through A-23. Among other things, Respondent argued that the verdicts were against the clear weight of the evidence. *Id.* at A-23. To reinstate the jury verdicts would effectively deny Respondent its right to have its motion for JNOV or a new trial decided by a judge who saw the witnesses testify, observed their demeanor and was in a position to judge their credibility. *See Marshall v. Lonberger,* 459 U.S. 422, 434 (1983) (reviewing court is not in a position "to redetermine credibility of witnesses whose demeanor has been observed by the . . . trial court."), *United States v. Oregon Medical Society,* 343 U.S. 326, 339 (1952) ("Face to face with living witnesses [the trial judge] holds a position of advantage from which appellate judges are excluded. . . . [T]he exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . .

How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.") (citation omitted); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992) (emphasizing "deference that is due the trial court's first-hand experience of the witnesses, their demeanor and the over-all context of the trial").

Clearly, Respondent is entitled to have a ruling on its motion for a new trial at some point. Fed. R. Civ. P. 50 and Fed. R. Civ. P. 59. The only one who could make such a determination is the judge who presided over the trial and who was thereby able to observe the demeanor and testimony of live witnesses: Judge McNaught. As Judge McNaught has retired from the bench and is now deceased, the only practical way of protecting Respondent's right to move for a new trial would be to conduct a second trial to determine whether Petitioner's claims are valid. In this case, the second trial has already occurred and Judge Keeton has ruled that, for numerous separate and independent reasons, Petitioner cannot prevail on its claims.

4. Petitioner Has Already Received The Relief It Now Expressly Seeks: De Novo Review By a Judge Other Than Judge McNaught.

Judge Keeton conducted a *de novo* review of Judge McNaught's decision to order a new trial.

> [W]hen addressing the matter "*de novo*" (that is, independently and nondeferentially), I reach the conclusion that a new trial should have been granted. The primary grounds for this conclusion are the ambiguities and arguable inconsistency of findings

> of the jury and the insufficiency of the evidence to support the damages findings on any basis short of speculation.
>
> . . . .
>
> [I]f a court, considering the matter *de novo* in light of the full record in this case, did not order judgment for the [Respondent] on all counts tried to the jury, notwithstanding the verdict of the jury on some counts, it should at least set that verdict aside because the verdict was contrary to the overwhelming weight of the evidence on causation issues central to every claim asserted by the [Petitioner] and found for the [Petitioner] by the jury. Thus, it was entirely appropriate that a new trial be granted.

Memorandum and Order, June 7, 1993 (Keeton, J.), A-37 through A-38; Judgment, May 25, 1994 (Breyer, C.J.), A-9 ("Moreover, despite [Petitioner's] strong contrary protestations, our review of the record indicates that Judge Keeton gave Judge McNaught's 'new trial' decision that very new and independent review, with appropriate deference for the jury verdict, for which [Petitioner] argues.").

5. The Court Should Not Reinstate Demonstrably Erroneous Jury Verdicts.

Finally, it would be fundamentally unjust to reinstate jury verdicts which two federal judges have independently found to be demonstrably wrong. *Id.* at A-4.

B. It Would Be Unfair To Burden Respondent With The Task Of Briefing And Arguing The 28 U.S.C. §372(c) Issues Raised By Petitioner.

Respondent is a stranger to Petitioner's counsel's judicial misconduct complaint against Judge Keeton and the late Judge McNaught. Respondent was unaware until recently that such a complaint even had been filed and had absolutely no involvement with its consideration by the Circuit Counsel for the First Circuit. As detailed in the preceding section, Petitioner is not entitled to any additional relief on its claims against Respondent. The Court should not visit upon Respondent the task of defending against claimed deficiencies in a confidential proceeding in which it was not involved, nor should it impose on the Respondent the hardship and expense of remaining in this case any longer.

CONCLUSION

It would be improvident to grant a writ of certiorari in a case, such as this, in which no further relief can be granted to the Petitioner because it already has received all the relief available. The petition should be denied.

Respectfully submitted,

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October 14, 1994

(3)

FILED
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No. 94-479

In the Supreme Court of the United States

OCTOBER TERM, 1994

COOL LIGHT COMPANY, INC.,
PETITIONER,

v.

GTE PRODUCTS CORPORATION,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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CIRCUIT COUNCIL
FOR THE FIRST CIRCUIT

IN RE
COMPLAINT NO. 145
EDWIN McCABE

Before
TORRUELLA, SELYA, CYR, BOUDIN, and STAHL, *Circuit Judges*,
CARTER, LAFFITTE and DICLERICO, *District Judges*.

ORDER
ENTERED SEPTEMBER 13, 1994

Complainant, an attorney, has filed a petition for review of Chief Judge Breyer's dismissal of complainant's complaint of judicial misconduct filed under 28 U.S.C. § 372(c) against two district judges.

We will not repeat here the details of the complaint's allegations, which are summarized at greater length in Chielf Judge Breyer's order. In short, the complaint primarily alleges that the first judge, who presided over a civil suit brought by complainant's client and set aside jury verdicts in favor of complainant's client, told members of the jury after the trial that he disagreed with the jury's verdict and that complainant's clients's principal officer had been involved in drug dealing. According to complainant, these remarks demonstrated that the judge had been biased against complainant's client and should have recused himself. The complaint also argued that the remarks themselves were improper, as was the judge's failure to inform counsel that the judge possessed information about the principal's alleged drug involvement. Finally, the complaint suggested that the judge's mere possession of this information may have been improper, on the theory that

there was no innocent reason why the judge should have known about the principal's prior drug indictment.

As for the second named district judge, the complaint alleged that this judge, in denying complainant's motion for relief from judgment under Fed. R. Civ. P. 60(b), had ruled that because complainant's client had already received all the relief to which he would have been entitled had the first judge recused himself — i.e., a new trial before a different judge — there was no need for complainant to conduct discovery concerning the judge's alleged remarks to the jurors. This ruling, complainant objected, prevented complainant from getting to the bottom of the matter.

Chief Judge Breyer dismissed the allegations against the first judge on the ground that, long before the complaint had been filed, this judge had retired from judicial office. A complaint against a retired judge, the chief judge ruled, was ordinarily not cognizable under the Act. Although there might conceivably be exceptions to this rule (for example, where an investigation into the complaint might discover information which could be used to correct undesirable practices in the court generally), the chief judge found that these exceptions did not apply in this matter, since the allegations were limited to misconduct of the retired judge personally.

The chief judge dismissed the complaint's allegations against the second judge on the ground that they were not cognizable under the Act because they were directly related to this judge's ruling denying the Rule 60(b) motion. *See* 28 U.S.C. § 372(c)(3)(A)(ii). The chief judge noted that that ruling was then on appeal.

Since Chief Judge Breyer's dismissal, the first judge has died. And, the court of appeals has affirmed on the merits the second judge's denial of the Rule 60(b) motion (including, implicitly, the second judge's refusal to permit complainant to conduct discovery into the matter).

The petition for review takes issue with Chief Judge Breyer's conclusion that in view of the first judge's retirement from judicial office, no purpose would be served by an inves-

tigation into the complaint's allegations against the first judge. Complainant points to the chief judge's observations that the Act's "purpose is essentially forward-looking," and that "investigating allegations against a former judge who is no longer part of the federal court system *ordinarily* could do nothing to improve the administration of justice in the federal courts" (emphasis supplied by complainant), and argues that "this is not the ordinary case." Although the petition is vague as to why this matter should be thought so extraordinary as to merit investigation, apparently complainant's position is that the complaint's allegations against the first judge are so serious that they simply ought not to go uninvestigated.

We are not persuaded by these arguments. For one thing, the first judge's death obviously moots and renders pointless any inquiry for purely disciplinary purposes.

We recognize, as did Chief Judge Breyer, that in some circumstances inquiry might be warranted for other than disciplinary purposes. Quoting former Chief Judge Campbell's earlier statements in his order dismissing complaint no. 27 (11/21/86), Chief Judge Breyer's order noted that "if a complaint had potential merit, the [Judicial] Council might still wish to make inquiry even after a judge left the bench (particularly in the bankruptcy court), on the possibility that it would discover information which could be used to correct undesirable administrative practices that might still be extant in that court." We agree, however, with Chief Judge Breyer that the instant complaint levelled allegations of misconduct on the part of the first judge *personally* — such as deliberate failure to recuse, improper statements to jurors, and so on — that did not raise any significant possibility of correcting undesirable practices in the court generally. Thus, the goal of correcting undesirable practices in the courts does not provide any basis for inquiry into this complaint despite the judge's retirement and subsequent demise.

As for the complaint's allegations against the second judge, we affirm the chief judge's dismissal for the reasons stated by the chief judge. The correctness of the second judge's ruling

not to permit discovery is a merit-related matter not cognizable under the Act, but rather properly challenged by way of appeal. 28 U.S.C. § 372(c)(3)(A)(ii). Complainant has taken an appeal and lost.

In any event, there is no provision in the Act, or in the Local Rules Governing Complaints of Judicial Misconduct or Disability, permitting a complainant to obtain discovery. To the contrary, the Act and the Rules contemplate that factual investigation into a complaint, where appropriate, shall ordinarily be undertaken by the chief judge, Rule 4(b), by a special investigating committee, Rules 10-13, or by the circuit council, Rules 14(b), 15(b), not by the complainant. *See* commentary to Rule 13 ("these rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely within the discretion of the special committee").

The petition for review is *denied*.

By the Circuit Council:

s/ VINCENT FLANAGAN
Secretary